Manitoba

Law Reform Commission

Commission de réforme du droit

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DISCUSSION PAPER
ON
DISTRESS IN COMMERCIAL TENANCIES

May, 1990

Persons wishing to respond to the issues raised in this Discussion Paper are invited to write to the Commission at the following address:

Manitoba Law Reform Commission
12th floor
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Unless clearly marked to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or in part, and to the comments being attributed to them. However, requests for confidentiality or anonymity will be respected to the extent permitted by *The Freedom of Information Act*.

We request that comments be submitted to the Commission not later than September 15, 1990.

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CHAPTER 1

INTRODUCTION

If a tenant of commercial premises (such as a retail store, office or warehouse space) is in arrears in the payment of rent, the landlord may enter the premises, seize the tenant's goods found there, and then sell them in order to satisfy the rent arrears. This remedy is known as distress for rent;[1] the action of pursuing this remedy is known as distraining or distraint.

Unlike most remedies, distress does not take place with a court's prior approval or under the supervision of a court; it is a private remedy of self-help. It is an exception to the general rule that precludes remedies against property without due process of law. The landlord or his or her representative simply shows up at the leased premises, often without warning, and, subject to minor formalities discussed later in this Paper, seizes some or all of the assets found there.

Until relatively recently, this remedy was available for all types of tenancies. However, distress under residential and agricultural tenancies has been abolished and is available now for commercial tenancies only. As will be seen in the next Chapter, while the essential elements of the law of distress can be stated very simply, the practical application of distress is far more complex. As the English Law Commission indicated in its 1986 Working Paper on *Distress for Rent*:

> There are complex bodies of rules, to be found scattered through centuries of case law and statute books, governing the conditions for exercise and every step of the procedure, such as who may exercise the remedy, to recover what amount of rent, upon which goods, when and how the distrainor may act, and so on.[2]

In addition to centuries of common law and old English statutes, the law of distress in Manitoba is governed by two provincial statutes: *The Distress Act* and scattered sections of *The Landlord and Tenant Act*. Neither can be considered an "easy read".

The purpose of this Working Paper is to examine the law of distress in commercial tenancies in Manitoba, to identify problem areas and to discuss the various options for reform. The reform options, if, in fact, there is felt to be a need for reform, would include the abolition of the remedy, statutory modification or codification of distress law, or a simple restatement of the law in clearer, more modern language. Chapter 2 of this Discussion Paper sets out the present state of the law in Manitoba; it is a rather detailed Chapter, testament to the rules, exceptions to rules and exceptions to exceptions which characterize this subject. In setting out the present law, we also attempt to identify some of its weaknesses and in Chapter 3 we set out some options for

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[1] A party with a right to distrain may seize the goods of a wrongdoer as a pledge for the "redress of an injury, the performance of a duty, or the satisfaction of a demand," or, in some circumstances, the seized goods can be sold to satisfy the distrainer's claim.: 13 *Halsbury's Laws of England*, para. 201, n. 1 (4th ed.), citing Bradby, *Law of Distresses* (2nd ed.) 1. Distress for rent is an example of this remedy. To give another example, municipalities and Crown departments and agencies are sometimes given the right to distrain for taxes and sell the distrained goods.

[2] The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 9.

reforming these weaknesses. Chapter 4 concludes this Discussion Paper with a request for comments on the adequacy of the present law and the options for reform which we present; some specific questions are set out. We have also included the following as appendices:

A - *The Distress Act* of Manitoba (and regulation setting out permitted costs);

B - Relevant extracts from *The Landlord and Tenant Act* of Manitoba; and

C - Draft *Rent Distress Act* proposed by the Law Reform Commission of British Columbia.

This paper is the first in a series dealing with Parts I, II and III of *The Landlord and Tenant Act*. Part IV of this Act, which deals exclusively with residential tenancies, has been excluded from this project as it is already the subject of study and proposed new legislation from a government department.

This Discussion Paper is distributed by the Manitoba Law Reform Commission in order to elicit comments from interested individuals and organizations about the issues raised in it. Once these comments have been received, the Commission will consider them and then prepare its Report on Distress for Rent in Commercial Tenancies. In accordance with *The Law Reform Commission Act*, that Report will be submitted to the Minister of Justice and Attorney General of Manitoba for his consideration.

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CHAPTER 2

THE PRESENT LAW AND ITS PROBLEMS

The right of a landlord to take distress on the goods of his or her tenant arose during feudal times and the rules surrounding the exercise of this right have not changed greatly since that time. These rules can initially be found scattered over numerous cases decided over the last several hundred years. This judge-made law was also altered from time to time by statutes. Again, these are often of considerable antiquity; for example, as will be seen, the *Statute of Marlborough*,[1] passed in England in 1267, and the English *Landlord and Tenant Act, 1709*[2] remain of vital relevance to the present-day law of Manitoba.

Some of these old cases and statutes have been restated in two pieces of current Manitoba legislation: *The Landlord and Tenant Act* and *The Distress Act*. Unfortunately, only some of this law has been brought forward into these statutes. Many of the more arcane rules which govern distress in commercial tenancies remain buried in these old cases and statutes, accessible only to lawyers who have an expertise in the area. Furthermore, the present Manitoba statutes are not themselves great examples of clarity. The language found in them is often little updated from the ancient statutes from which they were drawn. Consider, for example, the following:

> Where any tenant, for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is reserved, due, or made payable, fraudulently or clandestinely conveys away, or carries off or from the premises his goods or chattels to prevent the landlord from distraining the same for arrears of rent so reserved, due or made payable, the landlord or any person by him for that purpose lawfully empowered, may, within 30 days next ensuing the conveying away or carrying off, take and seize such goods and chattels wherever the same are found, as a distress for the arrears of rent, and the same sell or otherwise dispose of in such manner as if the goods and chattels had actually been distrained by the landlord upon the premises for the arrears of rent.[3]

It seems appropriate to make the preliminary comment that, whatever other reforms are determined to be appropriate, a redrafting of the current legislation in more modern language would be a major step forward.

We shall now set out an overview of the present law of distress in Manitoba, commenting from time to time on its oddities and inconsistencies.

A. WHEN THE RIGHT TO DISTRAIN ARISES

To satisfy arrears of rent, the landlord had the right at common law to secure the payment of rent by seizing goods and chattels found on the leased premises. Having seized the chattels, the landlord could hold them as a pledge for payment but could not sell them. This was changed by statute and the landlord was given the power to sell.

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[1] *Statute of Marlborough*, 52 Hen. III, c. 15 (1267).

[2] *Landlord and Tenant Act, 1709*, 8 Anne, c. 18.

[3] *The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 40(1).

The landlord's right to distrain for arrears of rent arises by common law in every landlord-tenant relationship and the right to distrain does not need to be expressly reserved. There are three major prerequisites which must be satisfied before there can be a distraint for rent. First, there must be a landlord-tenant relationship Second, there must be arrears of rent. Third, the arrears of rent must have arisen in a type of tenancy where distress for rent has not been statutorily abolished.

1. The Landlord and Tenant Relationship

At common law, a landlord could only distrain during the term of the lease. Once the lease was over, the right to distrain for arrears under that lease disappeared. The English *Landlord and Tenant Act, 1709*[4] changed this rule and granted the landlord an extension of six months after the end of the lease to distrain, but that extension was only exercisable where the landlord retained his or her interest in the property and the tenant remained in possession. Manitoba has adopted a similar rule under section 30 of *The Landlord and Tenant Act* except that there is no six month extension in the section. It is possible, however, that the six month extension may apply nonetheless by virtue of that part of the English *Landlord and Tenant Act, 1709*[5] continuing in force in this province. However, it seems to us that this point should be clarified.

If the tenant has gone out of possession, there can be no right to distrain. Similarly, if the tenant surrenders the lease, the right of distress is lost.[6] If a landlord, having a legal right to do so, enters the demised premises and causes the lease to be forfeited, he or she thereby loses the right to subsequently distrain for rent, whether or not that rent became due before or after the entry.[7] The requirement that the tenant remain in possession has been subjected to severe criticism. As the Law Reform Commission of British Columbia stated:

> These provisions create a technical difficulty where a distress is made coincidental with, or as part of, a termination of the tenancy by the landlord through his retaking possession of the premises. In such a case, retaking the premises may simply involve putting a padlock on the door. But section 4 [of the British Columbia *Commercial Tenancy Act*] permits distress only when the tenant remains in possession and this is inconsistent with "padlocking" the premises. In the result, the landlord must exercise great caution in the order in which he asserts his rights. He must distrain first and padlock the premises second. If the order of those steps is reversed -- even though they may only be minutes apart -- the distress is unlawful.
>
> In the *Report on Distress* it was concluded that this rule was an anachronistic technicality which placed landlords in needless jeopardy. It was recommended that section 4 be amended by striking out the words "and during the possession of the tenant from whom the arrears became due." The effect of this amendment would be to make the order in which the landlord asserts his rights irrelevant.[8]

The Commission would welcome any comments or opinions with respect to this point as it would appear that Manitoba landlords face the same risk in seizing and "padlocking".

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[4] *Landlord and Tenant Act, 1709*, 8 Anne, c. 18.

[5] Williams and Rhodes, *Canadian Law of Landlord and Tenant* (6th ed. 1988) 8-3. See also *obiter* comments in *Stanley* v. *Willis* (1914), 24 Man. R. 192 (C.A.), in which the court cites the English statute as being received legislation in Manitoba.

[6] E.g., *Lewis* v. *Brooks* (1852), 8 U.C.Q.B. 576 (C.A.); *Bruce* v. *Smith*, [1923] 3 D.L.R. 887 (Alta. C.A.).

[7] *Baker* v. *Atkinson* (1886), 11 O.R. 735 (Q.B.), rev'd on other grounds (1887), 14 O.A.R. 409 (C.A.); *Stanley* v. *Willis* (1914), 24 Man. R. 192 (C.A.). In *Ian F. Brown Ltd.* v. *Carling O'Keefe Breweries of Canada Ltd.* (1989), 64 D.L.R. (4th) 710 (Alta. Q.B.), a notice to terminate given by the landlord to the tenant was held to be an election on the part of the landlord to end the lease, even though the landlord did not re-enter the premises. As a result, a subsequent attempt to distrain was held to be illegal.

[8] Law Reform Commission of British Columbia, *Report on the Commercial Tenancy Act* (Report #108, 1989) 90.

At common law, the right to distrain for rent could only be exercised by the owner of the reversionary interest[9] and that interest had to be vested in the owner at the time of the distress. The right to distrain at common law was thus not assignable, was not a form of security held by a creditor in respect of a debt and could not apply to rent seck.[10] That general rule has been altered by statute and, under subsection 29(3) of *The Landlord and Tenant Act*, the remedy of distress is available in situations involving rent seck.

At common law, the executors and administrators of a landlord's estate could not distrain for arrears of rent which accrued during the lifetime of the landlord. However, section 32 of *The Landlord and Tenant Act* now permits this. The right of an executor to distrain arises on the death of the landlord testator; the right of the administrator to distrain arises upon the granting of the letters of administration.[11]

The right of a corporation to distrain existed at common law and is statutorily confirmed by subsection 15(1) of *The Corporations Act* of Manitoba which states that a "corporation has the capacity and, . . . the rights, powers and privileges of a natural person."[12]

It would appear that a partnership or joint tenants may distrain and that the consent of all partners or joint tenants is unnecessary. One partner or joint tenant can authorize the distraint.[13]

It would also appear that, where a receiving order is made against a landlord, the landlord's right to distrain ceases but the receiver may distrain for the rent due.[14]

The right of the landlord to distrain can either be exercised personally or through an agent, normally a bailiff. Where an agent or bailiff is utilized, a distress warrant is usually issued. In Manitoba, section 6 of *The Distress Act* makes it clear that "[n]o sheriff, under-sheriff or constable need be present or assist at a distress or seizure."[15]

The Crown is immune from distress.[16]

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[9]The owner of the reversionary interest can be thought of as the ultimate owner of the land. Thus, for example, where an individual is granted land for his or her life (a life estate), the person who is entitled to the land on his or her death is the owner of the reversionary interest.

[10]Rent seck is the type of rent payable where a right to receive rent has been given to a person who does not have any reversionary interest in the leased property. It amounts to the right to receive rent, without the right of distress. For example, at common law, an assignment of rent does not give the assignee the right to distrain.

[11]An executor is appointed by the testator's will and has certain powers, including the right to distrain, from the moment the testator dies. An administrator is appointed by the court and cannot distrain before the grant of letters of administration: *Woolley* v. *Clark* (1822), 5 B. & Ald. 744, 106 E.R. 1363 (K.B.).

[12]*The Corporations Act*, C.C.S.M. c. C225, s. 15(1).

[13]*Morgan* v. *Parry* (1856), 17 C.B. 334; 139 E.R. 1101 (C.P.). While the others may not need to authorize the distress, it may be possible for them to forbid a distress for the rent due to all: *Robinson* v. *Hofman* (1828), 4 Bing. 563; 130 E.R. 885 (C.P.).

[14]*Wilkins* v. *Miner*, [1927] 1 D.L.R. 286 (Alta. C.A.).

[15]*The Distress Act*, C.C.S.M. c. D90, s. 6.

[16]*A.G. Canada* v. *Gordon*, [1925] 1 D.L.R. 654 (Ont. S.C.); *Secretary of State for War* v. *Wynne*, [1905] 2 K.B. 845.

2. There Must Be Arrears of Rent

While distress was an incident of every rent at common law, the right to distrain does not come into being until there is a non-payment of rent.[17] Rent is not considered to be in arrears until the last minute of the day on which it becomes due; therefore, there can be no distress until the day after the rent was due.[18] Any distress taken before that time will be illegal.

The amount of rent in question must be certain as well as being in arrears. If the amount of the rent owing is not certain, there is no right to distrain.[19] Normally, a rental agreement will provide for fixed payments at regular intervals and a right to distrain arises if a payment is not made. However, a rent which fluctuates from year to year or month to month (as, for example, one based on a percentage of sales for the lease of retail space) is considered sufficiently certain for distress purposes if it can be calculated with certainty at the time that it becomes due.[20]

Rent payable in advance may be distrained once it is in arrears. If the rent is expressed to be payable in advance "if required", a demand for payment must be made before the landlord distrains. It is also possible for a landlord to distrain for accelerated rent, but this right of distress must be reserved in the lease.[21]

As rent must be in arrears at the time of the distress, the landlord is not allowed to use any proceeds of sale from a distress to satisfy any arrears which have arisen since the initial distress. In a situation where new arrears have accrued, the landlord must return to the tenant the overplus[22] or any unsold goods seized and then pursue a new remedy for new arrears. This could include another distress for the new arrears. It appears to us that this rule ignores the repetitive nature of rental obligations. Forcing a landlord to distrain repeatedly or to seek alternative remedies when the "new" arrears could have been partially or totally satisfied from earlier sale proceeds seems cumbersome and unnecessary.

3. The Right to Distrain Must Not Have Been Abolished

At common law, distress applied to all forms of tenancies. However, in many jurisdictions, distress has been either totally or partially abolished by statute. In Manitoba, distress with respect to residential tenancies was abolished in 1970.[23] Distraint with respect to farm property was abolished in Manitoba at the same time.[24] However, it should be noted that, in the process of abolishing distress for farm tenancies, the Legislature neglected to repeal of sections 33 and 34 of *The Landlord and Tenant Act*. These sections deal with the distress of grain, cattle and standing crops, provisions which now seem obsolete.[25]

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[17]By statute, a similar rule applies with respect to rent seck. Rent seck is the type of rent payable which does not include a right of distress; see *supra* n. 10.

[18]*Dibble* v. *Bowater* (1853), 2 El. & Bl. 564; 118 E.R. 879 (Q.B.).

[19]*Regnart* v. *Porter* (1831), 7 Bing. 451 at 454; 131 E.R. 174 (C.P.).

[20]*Greater London Council* v. *Connolly*, [1970] 2 Q.B. 100 (C.A.).

[21]Williams and Rhodes, *Canadian Law of Landlord and Tenant* (6th ed. 1988) 8-18.

[22]Overplus refers to any proceeds obtained from the sale of the distrained goods which exceed the amount of rent owing at the time of distraint plus certain allowable costs.

[23]*An Act to Amend The Landlord and Tenant Act*, S.M. 1970, c. 106, s. 3 (*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 85).

[24]*An Act to Amend The Landlord and Tenant Act*, S.M. 1970, c.106, s. 2 (*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 76.) No definition of "farm property" is found in *The Landlord and Tenant Act* and there appears to be no case law defining it.

[25]These sections might perhaps theoretically apply to grain elevators or abattoirs.

Due to these statutory reforms, distress in Manitoba is now limited to commercial tenancies.

B. DETERMINING THE AMOUNT OF RENT OWING

1. What Is "Rent"?

"Rent" has often been defined in the case law, generally along the following lines:

> Of course, in order to be a rent, a receipt by a landlord must be a payment made to him in consideration of the enjoyment by a tenant of land belonging to the landlord. . . .[26]

The common law has traditionally seen rent as something which issues out of land as compensation to the landlord for the tenant's possession during the term of the lease. By saying that rent issues out *of land* or is payment "in consideration of the enjoyment by a tenant *of land* . . ." potential problems can arise. For example, some leases will define service charges, insurance premium reimbursements and other tangential obligations as "rent". While the tenant's continued occupation may depend on payment of those amounts, there is some question as to whether those amounts could be distrained for at common law as they are not, strictly speaking, directly attributable to the use or enjoyment of land.

The Law Commission of England, in its 1986 Working Paper on *Distress for Rent*, dealt with this issue.[27] The opinion expressed there was that, although the lease may define such obligations as "rent", the inherent right to distrain for arrears of rent does not necessarily attach to all sums described in a lease as "rent". While the parties might provide that such amounts can be distrained for, that right of distress would be contractual rather than inherent. The result would be that the landlord's rights would be more limited with respect to those "tangential rents" than with respect to any "pure rent" owing. For example, a landlord normally has certain rights to seize the goods of third parties in a distress situation: where the right to distrain for "tangential rent" is a term of the contract, the right to seize third party goods would presumably be unavailable as the third party would not be bound by the contract between the landlord and the tenant.

In light of this ambiguity, it may be advisable to formulate a statutory definition of "rent" for distress purposes. If so, consideration would have to be given to what obligations should be included in the definition.

2. Limits on Amount of Arrears

In most common law jurisdictions, the normal statutory limitation rules for contracts apply to distress for rent. Thus, in England and most Canadian jurisdictions, the limitation for the collection of arrears of rent is six years after the rent became due or six years after an acknowledgement in writing. Nova Scotia allows for a twenty year period, as used to be the case in British Columbia.[28]

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[26] *T. & E. Homes Ltd.* v. *Robinson*, [1979] 1 W.L.R. 452 at 459 (C.A.), per Templeman L.J.

[27] The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 20-22.

[28] For a list of the relevant Canadian statutory provisions see Williams and Rhodes, *Canadian Law of Landlord and Tenant* (6th ed. 1988) 8-11 to 8-12.

Manitoba is unusual in that special limitation rules apply to distress. Subsection 29(1) of *The Landlord and Tenant Act* provides that:

> No person may distrain as against the tenant or any other person for more than the next preceding three month's arrears of rent where the rent is payable quarterly or more frequently, nor for more than the next preceding one year's arrears where the rent is payable less frequently than quarterly.

In Manitoba the upper limit on the amount of arrears distrainable is thus one year's arrears, with three months' arrears being the upper limit in the more typical situation where rent is payable quarterly or more frequently than quarterly.

The Manitoba Court of Appeal has held that "the next preceding three month's arrears of rent" limits the arrears to those arising within the three month period immediately prior to the making of the distress.[29] In Manitoba, then, prompt action by a landlord to protect his or her interests is more vital than in other jurisdictions. Perhaps there should be some reflection as to whether this is appropriate. Does this rule force landlords to distrain on tenants sooner than they otherwise would or in situations where they might otherwise prefer to wait?

In Manitoba, upon an assignment or a receiving order under the *Bankruptcy Act*[30] in respect of the tenant, the landlord loses the right to distrain or realize on the distress. The assignee or trustee for the tenant has the right to take immediate possession of any goods or chattels which have been seized but not sold at the time of the receiving order.[31] In return for this loss of distress rights, the landlord is given a preferential statutory lien under subsection 46(1) of *The Landlord and Tenant Act* and subsection 8(3) of *The Distress Act*. In bankruptcy situations, the rights of the landlord will be determined by section 107(1)(f) of the *Bankruptcy Act*. That section entitles the landlord to proceeds from the bankrupt's property for arrears equivalent to a three month period immediately preceding the bankruptcy, together with an entitlement to three months of accelerated rent if such a provision exists in the lease; the landlord's right is, of course, subject to the rights of the secured creditors but it is in priority to the rights of the unsecured creditors.

3. Deductions from Rent

At common law, the tenant was not allowed to make any deductions from rent before paying it. The landlord was therefore entitled to distrain for the entire amount of rent in arrears. Under section 39 of *The Landlord and Tenant Act*, the tenant is now given the right to set off against the rent due any debt due to the tenant by the landlord, provided that the tenant gives notice of the claim or set-off in the required form before or after the seizure.[32]

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[29] *Wrightmar Industries Ltd.* v. *Assiniboia Downs 81 Ltd.* (1983), 148 D.L.R. (3d) 760 (Man. C.A.).

[30] *Bankruptcy Act*, R.S.C. 1985, c. B-3.

[31] *The Distress Act*, C.C.S.M. c. D90, s. 8(2).

[32] Subsection 39(3) deals with the manner of giving the landlord notice and s. 39(4) provides that a defect in form does not invalidate proceedings under s. 39. Once the landlord has been given notice, s. 39(2) applies:

> When the notice is given the landlord is entitled to distrain, or to proceed with the distress, only for the balance of the rent after deducting any debt justly due by him to the tenant which is mentioned in the notice.

Once notice has been given under s. 39, either party may apply, pursuant to s. 60 of *The Landlord and Tenant Act*, to have a judge of the Court of Queen's Bench determine, in a summary way, any matters in dispute. Subsection 60(1) applies to the situation where the goods or chattels have already been distrained and the dispute concerns either the landlord's right to distrain or the amount of arrears being claimed, or the tenant's right of set-off. Subsection (2) applies to a dispute being adjudicated before the distress takes place.

There is an interesting difference in wording between the two subsections. While s. 60(1) makes specific reference to set-off claims, s. 60(2) does not. Does this mean that a tenant's claim for a set-off cannot be adjudicated until after distress has been effected? One would presume that that was not the intention of the Legislature.

C. TAKING THE GOODS

The actual taking of distress is perhaps most easily seen as involving two positive actions by the landlord. First the landlord must take the goods from the tenant's possession. Second, the landlord may sell the goods to satisfy the arrears of rent. There are many, often complex, rules which govern all of the landlord's actions. In this section, the rules relating to the landlord's taking of the goods will be reviewed.

1. Location

Chapter 15 of the *Statute of Marlborough*[33] laid down the general rule that only goods located on the premises which are the subject of the lease are liable to be taken for rent distress. That rule is restated in section 35 of *The Landlord and Tenant Act*:

> Save as herein otherwise provided, goods or chattels that are not at the time of the distress upon the premises in respect of which the rent distrained for is due shall not be distrained for rent.

The landlord is allowed to seize goods found anywhere within the demised premises. Problems may arise, however, where the extent of the demised premises is unclear. For example, vehicles belonging to a tenant which are parked in an adjacent parking lot may or may not be liable to distress depending on the wording of the lease.[34] Should there be a specific statutory definition of "demised premises" in order to help eliminate such gray areas?

The landlord does have a limited right to seize goods belonging to the tenant which are not on the demised premises at the time of the distress. Beginning with the *Distress for Rent Act, 1737*,[35]landlords were given the right to distrain and sell goods which had been fraudulently carried off the demised premises within 30 days of their removal. Subsection 40(1) of *The Landlord and Tenant Act* is very similar in wording to section 1 of the 1737 Act. The landlord thus has a limited right to follow the goods and chattels of the tenant, but that right ends where such goods or chattels have been sold to a *bona fide* purchaser in good faith for valuable consideration before the landlord seizes them.[36] Although the statute gives the landlord the right to distrain as though the goods had not been fraudulently removed, this right is premised on the tenant's continued possession of the premises. If the tenant is no longer in possession, the landlord has lost the right to distrain and cannot follow the fraudulently removed goods.[37]

Four other exceptions to the general rule that seizures can only take place on the demised premises are discussed by Williams and Rhodes in *Canadian Law of Landlord and Tenant*. Two of the exceptions involve cattle on highways and can probably be safely disregarded since distress has been abolished in Manitoba with respect to agricultural tenancies.[38] The third exception is that the parties can agree that distress can be made on lands of the tenant other than

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[33]*Statute of Marlborough*, 52 Hen. III, c. 15 (1267).

[34]The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 36.

[35]*Distress for Rent Act, 1737*, 11 Geo. II, c. 19.

[36]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 40(2)

[37]Williams and Rhodes, *Canadian Law of Landlord and Tenant* (6th ed. 1988) 8-55.

[38]Theoretically, the exceptions might have some relevance for an abattoir or a meat-packing plant.

those covered by the lease.[39] The last exception is that the Crown may distrain on any of its tenants' lands, wherever they are situated.[40]

2. Time

The only statutory rule with respect to the time of making a distress is found in section 41 of *The Landlord and Tenant Act* which states that, in cases of fraudulent removal of goods by the tenant, the landlord can only break into buildings or enclosures to distrain "in the daytime"; this provision originated in the *Distress for Rent Act, 1737*. Although there are statutory rules in other jurisdictions regulating the time when "normal' distresses may be made,[41] in Manitoba there are none. However, there is considerable common law authority for the proposition that distress cannot be made at night, that is, between the hours of sunset and sunrise.[42] If distress is not made in the daylight hours, it will thus be illegal. We wonder whether this is reasonable, given that some businesses, such as nightclubs, movie theatres and some restaurants are only or mainly open at night. Given that landlords can only enter when the premises are unlocked, requiring that they do so during daylight hours might effectively deny a landlord the right to distrain. This would be especially true during the winter months when the days are shorter.

It has also been generally accepted that distress cannot be made on a Sunday. However, the older cases which established that rule may be open to some doubt due to changes in Sunday observance legislation and more permissive attitudes in current society.[43] If a business can be open on a Sunday, why should a landlord not be able to enter on that day to distrain?

In both cases, it may be preferable to define statutorily when a landlord may enter. A possible solution would be to allow a landlord to enter at a "reasonable time". Since distress is only available in Manitoba with respect to commercial tenancies, any time that an establishment is open for business would probably qualify as a "reasonable time", as would any other time that the premises are unlocked during daylight hours.

3. Quantity of Goods Taken

The basic rule is that the landlord is only allowed to distrain sufficient goods to satisfy the arrears of rent plus the landlord's recoverable costs. While the landlord is not obliged to calculate precisely the value of the property being seized, it must not be unreasonably large. If the amount of property distrained is excessively large, the landlord may be liable in damages to the owner of the goods.

These rules originate from the *Statute of Marlborough* (1267) and the *Statutes of the Exchequer*.[44] The modern Manitoba counterparts of these sections are found in *The Landlord and Tenant Act*. Section 29(2) of the Act provides with uncharacteristic simplicity:

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[39]*Daniel* v. *Stepney* (1874), L.R. 9 Ex. 185. But the right to distrain would be based in contract, and thus be limited to the goods of the tenant as there is no privity of contract between the landlord and a third party whose goods may be found on the premises.

[40]Williams and Rhodes, *Canadian Law of Landlord and Tenant* (6th ed. 1988) 8-55.

[41]Williams and Rhodes, *Canadian Law of Landlord and Tenant* (6th ed. 1988) 8-49, refer to Alberta (no distress between 8 p.m. and 5 a.m. unless otherwise ordered by the court); New Brunswick (no distress between 6 p.m. and 8 a.m.); and Prince Edward Island and the Yukon Territory (no distress between 5 p.m. and 8 a.m.).

[42]E.g., *Tutton* v. *Darke* (1860), 5 H. & N. 647; 157 E.R. 1338 (Exch.); *Russell* v. *Buckley* (1885), 25 N.B.R. 264 (C.A.).

[43]See Williams and Rhodes, *Canadian Law of Landlord and Tenant* (6th ed. 1988) 8-50.

[44]The year of this statute is uncertain. It apparently dates either from the 51st year of Henry III's reign (1267) or from the reign of Edward I (1272-1307).

Distress shall be reasonable.

Subsection 51(1) of the Act provides that:

> A distrainor who takes an excessive distress, or takes a distress wrongfully, shall be liable in damages to the owner of the goods or chattels distrained.

The test would appear to be one of good faith by the landlord, although malice need not be shown for a tenant to succeed in such an action.[45] Whether the amount of the distress is excessive is a question of fact to be left to the judge or jury,[46] but the excess must be considerable for the tenant to succeed.[47]

There seems to be only one exception to the general rule that the courts will recognize. In situations where there is no other asset available on the premises, the taking of one entire thing is not excessive, even if it is of disproportionate value.[48]

4. Privileges and Exemptions

At common law, the general rule was that all cattle, goods and chattels found on the leased premises could be distrained for rent. Thus, the landlord was allowed to distrain goods which belonged to third parties, even with knowledge that the goods did not belong to the tenant. From that general rule, there are many exceptions, both statutory and at common law.

(a) Third party goods

While the common law recognized certain exemptions for third party goods, those rules were altered by statute in Manitoba. Section 37 of *The Landlord and Tenant Act* reverses the general common law rule and provides that a landlord may not distrain for rent on goods belonging to any person except the tenant or person who is liable for the rent. It then goes on to make the following exceptions (intended to limit the interests of certain third parties or of persons involved in potentially collusive or non-arms length transactions):

(1) the property of the tenant's immediate family;[49]

(2) the property interests of those third parties whose interests are derived from the tenant or a member of his immediate family;

(3) goods which have been loaned or rented for the purpose of defeating the landlord's right to distrain; and

(4) the tenant's interests in any goods on the premises in the tenant's possession under an as-yet-uncompleted contract for purchase.

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[45] *Huskinson* v. *Lawrence* (1865), 25 U.C.Q.B. 58 (C.A.).

[46] *Smith* v. *Ashforth* (1860), 29 L.J. Ex. 259.

[47] *Field* v. *Mitchell* (1806), 6 Esp. 71; 170 E.R. 833 (C.P.).

[48] *Avenell* v. *Croker* (1828), M. & M. 172; 173 E.R. 1120 (K.B.).

[49] The section also excludes the property of "... any other relative of his in case the relative lives on the premises as a member of the tenant's family; ...." The section has obviously not been amended since distress for residential tenancies was abolished.

Goods belonging to the Crown are absolutely privileged and can never be distrained.[50]

One problem with those third party goods which can be seized is that it is not clear where the onus lies in identifying the goods in question as third party goods. Does the owner of the goods have to come forward to claim the exemption? If so, what if he or she is not even aware of the distress having occurred? Should the tenant bear the responsibility? The tenant would appear to be in the best position to do so, but it may be in the tenant's best interests to let the landlord seize and sell goods belonging to a third party, thereby possibly avoiding the seizure and sale of any or some of his or her own chattels. Or should the landlord bear the responsibility? This would appear unfair as the landlord is probably in no position to determine the ownership of goods found on the premises. Perhaps the tenant should have to identify third party goods for the landlord, failing which the tenant would be liable to the third party for any damage suffered. Alternatively, should the third party claim for his or her loss directly against any overplus or unsold goods, if any, still in the hands of the landlord?

(b) Common law exemptions

The common law recognizes a number of situations where goods of a tenant are privileged and cannot be distrained. For instance, where goods, such as a vehicle or tools, are in actual use by the tenant at the time the landlord seeks to distrain, the landlord cannot distrain. However, should there be a pause in their use, the privilege is lost.[51] This rule seems to be an attempt to avoid breaches of the peace which might be caused by landlords trying to seize goods while the tenant has them in his or her actual physical possession.

Goods already in the custody of the law, such as those seized in execution, are immune from distress unless the execution has been abandoned. Although such goods are immune from distress, the landlord may have a statutory priority over other creditors to the proceeds of sale.

Money is not distrainable unless it is in a closed purse or bag.[52] The rationale for this rule is that there is no guarantee that loose bills and change will remain distinguishable from other money in the distrainer's possession; if the money is not distinguishable and the seizure is later deemed unlawful, it could not be guaranteed that the same money which had been seized was being returned to the tenant. Of course, one might wonder why the landlord could not simply be required to place loose bills and change into a closed bag or envelope.

Wild animals are exempt from distress at common law as, by definition, they do not belong to anyone. They may be distrained if they are domesticated or kept in captivity.[53]

Also exempt are perishable articles and other articles which cannot be returned to the tenant in the same condition they were in when seized.[54]

Fixtures, so long as they continue as such, cannot be distrained. This is also the case for fixtures known as "tenant's fixtures", even if there are no other goods on the premises. Only

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[50]*The Proceedings Against the Crown Act*, C.C.S.M. c. P140, s. 16(6). This section provides that "no execution, attachment or process in the nature thereof" shall be enforced against the Crown. It originates from the common law rule that the Crown was immune from execution.

[51]E.g., *Bissett* v. *Caldwell* (1790), Peake 50; 170 E.R. 75 (K.B.).

[52]*East India Company* v. *Skinner* (1695), Comb. 342; 90 E.R. 516 (K.B.).

[53]Co. Lit. 47. As a general rule, wild animals are now deemed to be property of the Crown: *The Wildlife Act*, C.C.S.M. c. W130, s. 85(1).

[54]E.g., *Morley* v. *Pincombe* (1848), 2 Exch. 101; 154 E.R. 423.

those goods which can be removed by the landlord without causing damage to the demised premises[55] and without causing injury to the goods can be distrained.[56] The rationale for this exemption is that, if the tenant tenders the arrears or successfully replevies (or retakes) the goods or if the distress is held to be illegal, the premises and the goods can be returned to the tenant in the same condition they were in before the seizure.

None of these exemptions are set out in legislation and so are accessible only to lawyers versed in this area of the law. Perhaps it would be in the public interest to remove some of the anomalies of the common law exemptions and restate the rest in statutory form.

(c) Statutory exemptions

Subsection 36(1) of *The Landlord and Tenant Act* of Manitoba sets out a number of statutory exemptions from distress. Most of the section sets out exemptions which were relevant when distress was still available with respect to residential tenancies. Few of them are relevant in a commercial setting. For example, beds and bedding in the normal use of the debtor and his or her family, the ordinary wearing apparel of the debtor and his or her family, the family's cooking utensils and their meat and vegetables - all still exempted by the Act from distress - would not normally be found outside of a residence. The only two clauses which would seem to have some continuing relevance are clauses 36(1)(e) and (f):

> (e) the tools, agricultural implements and necessaries used by the debtor in the practice of his trade, profession or occupation, to the value of $600.; and
>
> (f) 50 volumes of books, the books of a professional man, one axe, one saw.[57]

Subsection 36(2) provides that the "person claiming the exemption shall select and point out the goods and chattels which he claims to be exempt." Subsection 36(3) provides that any agreement or arrangement entered into, in any form, oral or written, with or without consideration, ". . . whereby an attempt is made to prevent any person from claiming any benefit, right or privilege of exemption under this Act, is void." In other words, it is not possible to contract out of the exemptions in subsection 36(1).

It seems clear that the statutory exemptions which are now irrelevant should be repealed and the rest should be re-examined to ensure that they are realistic under modern economic conditions. In particular, they ought to be compared with the exemptions available to a judgment debtor.[58]

5. Notice at Time of Distress

At common law, there was no requirement to give notice of a distress to the tenant unless the goods were impounded in a private pound, at which point the landlord was obligated to give

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[55] *Simpson* v. *Hartopp* (1744), Willes 512; 125 E.R. 1295 (C.P.).

[56] Co. Lit. 47a; *Pitt* v. *Shew* (1821), 4 B. & Ald.; 106 E.R. 913 (K.B.); *Bailey* v. *Miller*, [1932] 2 W.W.R. 260 (Sask. C.A.).

[57] Williams and Rhodes, *Canadian Law of Landlord and Tenant* (6th ed. 1988) 8-67. The authors take the position that clause (f) is also inapplicable due to the abolition of distress in residential tenancies. No authority or rationale is provided for this view. We are of the view that these items could be found in a commercial setting.

[58] *The Executions Act*, C.C.S.M. c. E160, s. 23. For example, this Act exempts "the tools, implements, professional books and other necessaries, not exceeding in value the aggregate sum of $7,500., used by the judgment debtor in the practice of his trade, occupation or profession or to carry on his business . . . ."

the tenant notice of where the goods were impounded.[59] This was altered by statute in England, so that notice of distress became necessary before seized goods could be sold.[60]

No prior notice of the distress is required in Manitoba either. Section 1 of *The Distress Act* requires only that any person levying a distress provide a copy of a demand to the person whose goods are being distrained, demanding payment of the amount owing and of all costs and charges of the distress. The section also provides that a copy or extract of the regulation prescribing the allowable fees and charges shall be printed on the demand or attached to it. This section is similar to the English regulations respecting distresses by bailiffs, except that an English bailiff is also required to provide the tenant with an inventory of the goods seized.[61]

6. Entry

At common law, the landlord has the right, in certain circumstances, to enter into or onto the demised premises to exercise his or her right of distress. Although the legal basis is obscure,[62] the right to distrain implies a licence for the landlord to enter the premises for the purpose of taking possession of chattels therein. Once lawfully on the premises, the landlord cannot be treated as a trespasser and ejected. However, the landlord has no right to make the initial entry by force. If the landlord did so, the entry would probably constitute the criminal offence of forcible entry. Similarly, the landlord may not use his or her key to open a locked door and gain entry.

A landlord may not break open an outer door of any building; however, an outer door which is closed but not locked can be opened in the ordinary way.[63] Once a landlord is lawfully inside, inner doors and partitions can be broken open.[64] An open window or skylight can be used as a means of entry, and one that is partially open can be opened wider to facilitate entry;[65] however, a window that is locked or one that is completely closed, but not locked, cannot be opened or broken into.[66] While gates cannot be broken open, fences and walls can be scaled to gain entry.[67]

There are two situations, recognized at common law, where a landlord may enter premises by force. First, where a landlord has not abandoned the distress and is subsequently forcibly ejected by the tenant, a peace officer may be called upon to assist in breaking into the premises.[68] Secondly, where the landlord obtains lawful entry, leaves temporarily and returns to find the premises locked, the door can be forcibly opened; the participation of a peace officer is apparently unnecessary in this case.[69]

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[59]*Kerby* v. *Harding* (1851), 6 Exch. 234 at 240-241; 155 E.R. 527 at 530.

[60]*Distress for Rent Act, 1689*, 2 Wm. & Mary, c. 5, s. 1.

[61]*Distress for Rent Rules 1988* (U.K.), S.I. 1988/2050, n. 12(2).

[62]This point is discussed in The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 53-55.

[63]*Ryan* v. *Shilcock* (1851), 7 Exch. 72; 155 E.R. 861.

[64]*Browning* v. *Dann* (1735), Cas. T. Hard 167 (K.B.); 95 E.R. 107, but outer doors cannot lawfully be broken open: *Semayne's Case* (1604), 5 Co. Rep. 91a, 77 E.R. 194 (K.B.).

[65]*Miller* v. *Tebb* (1893), 9 T.L.R. 515 (C.A.); *Crabtree* v. *Robinson* (1885), 15 Q.B.D. 312.

[66]*Attack* v. *Bramwell* (1863), 3 B. & S. 520; 122 E.R. 196 (Q.B.); *Nash* v. *Lucas* (1867); L.R. 2 Q.B. 590.

[67]*Eldridge* v. *Stacey* (1863), 15 C.B. (N.S.) 458; 143 E.R. 863 (C.P.).

[68]*Eagleton* v. *Gutteridge* (1843), 11 M. & W. 465; 152 E.R. 888 (Exch.); *Eldridge* v. *Stacey* (1863), 15 C.B. (N.S.) 458; 143 E.R. 863 (C.P.).

[69]*Bannister* v. *Hyde* (1860), 2 E. & E. 627; 121 E.R. 235 (K.B.).

The sole statutory provision dealing with entry involves premises other than the demised premises. If goods have been fraudulently carried away from the demised premises by the tenant and are locked in a building or are otherwise secured so as to prevent their being taken and seized as distress, the landlord or his or her agent can seize the goods by following certain procedures. First, a constable or peace officer must be called to assist with the taking of the goods. Second, they must attend at the location during the daytime. Third, they can break and enter into the building or enclosure and carry away the goods. If the building is a dwelling house, the landlord or agent is required to swear an oath that there is "a reasonable ground" to believe that the goods and chattels are inside before entering.[70] Of course, the tenant must be in possession of the demised premises and the landlord must retain his or her interest in the property.

It is suggested that these provisions are out of step with modern law. In the case of buildings or enclosures other than dwelling houses, the landlord need only "believe" that the goods or chattels in question are within. There is no requirement that the belief be justified in any way. In the case of a dwelling house, an oath of a reasonable ground must be sworn but the section does not indicate before whom it must be sworn or whether the person taking the oath has the authority to decide that the ground relied upon is not sufficient, thus denying the landlord the right to break in lawfully. One reasonable reform might be to require a landlord to swear an oath in front of a judge, magistrate or justice of the peace with that official being given the power to deny the landlord lawful entry.

The rules relating to lawful entry are complicated and often illogical. They have been built up over the years, often with no underlying principle to guide their development. The area is clearly in need of reform. For example, why should a landlord be able to enter through a partially open window by opening it wider but not be able to open an unlocked closed window? For that matter, is it desirable to have landlords crawling through windows and skylights when they have a key to the front door?

7. Seizure

To effect a proper seizure, the landlord must take three physical steps. First, the landlord must lawfully enter the premises. Second, the goods must be seized. Third, the goods must be impounded. Failure to follow all three steps will mean that the distress is incomplete or illegal.

The seizure of the goods may be either actual or constructive. Actual seizure is accomplished by laying hands on an article or articles and stating an intention to detain them until the arrears of rent are paid.[71] No particular words are required to state that intention but it should be manifest by what is said and done. It is also acceptable to pick up or touch one chattel and state that it is taken as a distress in the name of all of the goods on the premises, or of so much of the goods present as will satisfy the arrears. This will make for a valid seizure of all of the goods.[72]

Constructive seizure can occur in several ways. For example, preventing the removal of a chattel and stating that it shall not be removed until arrears of rent are paid has been held to constitute constructive distress.[73] Another example of constructive seizure occurred where the

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[70] *The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 41.

[71] *Cramer* v. *Mott* (1870), L.R. 5 Q.B. 357.

[72] *Dod* v. *Monger* (1704), 6 Mod. 215; 87 E.R. 967 (Q.B.).

[73] *Cramer* v. *Mott* (1870), L.R. 5 Q.B. 357; *Wood* v. *Nunn* (1828) 5 Bing. 10; 130 E.R. 962 (C.P.).

landlord walked around goods heaped on a wharf, indicated an intention to distrain them and gave written notice that the goods were distrained, but did not actually touch anything.[74]

If a tenant or any other person takes back the goods after they have been lawfully seized by the landlord, that person has committed the civil wrong of "rescous" (now known in Manitoba as rescue) and will be liable to the landlord for damages. However, no action will lie against a third party for removal of goods which have only been constructively seized.[75]

8. Impounding

Once goods have been seized they must be secured for safe custody; that is, the landlord must place them in the custody of the law by impounding them. The chattels must be impounded until the distress is satisfied or the required period has elapsed without the tenant replevying.[76] If the tenant has not replevied within the allowed time and the other conditions precedent are met, the landlord can then sell the goods. If the tenant tenders a sufficient amount to cover the rent arrears and the landlord's costs before the chattels are actually impounded, then it is illegal to proceed any further with the distress.[77]

Once goods are impounded, even if they have been distrained without cause,[78] they are in the custody of the law and anyone who removes them will be guilty of "pound breach" and will be liable to the landlord for damages.

Goods can be impounded either on or off the demised premises and section 43 of *The Landlord and Tenant Act* sets out certain rules. The first three subsections deal with the impounding of animals, a topic which probably no longer has any relevance due to the abolition of distress with respect to farm tenancies.[79] Subsection 43(4) reads, in part:

> Any person lawfully taking any distress for any kind of rent may impound, or otherwise secure the distress so made, in such place or on such part of the premises chargeable with the rent as is most fit and convenient for that purpose, and may appraise, sell and dispose of the same upon the premises . . . .

Subsection 43(4) is based on section 10 of the *Distress for Rent Act, 1737.*

If goods are impounded on the demised premises, it is advisable to move them to one or two rooms and lock those rooms.[80] However, there are cases where the landlord has been allowed to leave the chattels in their ordinary positions where that is done with the consent of the tenant.[81] The risk in leaving the chattels in their ordinary position is that it is not effective notice to third parties of the landlord's distress. As a result, an innocent third party would not be liable in pound breach were he or she to remove the goods.

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[74]*Swann* v. *Earl of Falmouth* (1828), 8 B. & C. 456; 108 E.R. 1112 (K.B.).

[75]*Pool* v. *Crawcour* (1884), 1 T.L.R. 165 (C.A.).

[76]For ease of discussion, we will employ the terms "replevy" and "replevin" throughout this paper. "Replevin" refers to the remedy of retaking goods wrongfully taken from a person. The remedy is now referred to in the Manitoba Queen's Bench Rules as "an interim order for the recovery of personal property" - see QBR 44.

[77]*Vertue* v. *Beasley* (1831), 1 Mood. & R. 21; 174 E.R. 8 (K.B.).

[78]*Cotsworth* v. *Betison* (1696), 1 Ld. Raym. 104; 91 E.R. 965 (C.P.).

[79]Abbatoirs and meat-packing plants again being possible exceptions.

[80]E.g., *Washborn* v. *Black* (1774), 11 East 405n; 103 E.R. 1060 (K.B.); *Woods* v. *Durrant* (1846), 16 M. & W. 149; 153 E.R. 1137 (Exch.).

[81]E.g., *Lavell & Co.* v. *O'Leary*, [1933] 2 K.B. 200 (C.A.).

A form of impounding, or perhaps a substitute for impounding, is a "walking possession" agreement. Under such an agreement, the goods seized are left in the tenant's possession on his or her undertaking not to remove or dispose of them. The tenant is free to use them in the normal manner while they remain in his or her possession. Landlords have argued that the power of distress lies not in the right to retain the distress sale proceeds but rather in the persuasive power that the landlords can exert on tenants to bring their financial affairs in check. The "walking possession" agreement serves to drive that point home without going the full distance of removing the goods from the tenant's possession.

One problem, of course, is that a "walking possession" agreement may not be effective against third parties, as the goods are not manifestly impounded.[82] There are also judicial dicta which state that the "walking possession" arrangement does not constitute an actual impoundment. If this view is correct, it technically would preclude pound breach[83]. It would also mean that title to the goods could not be passed in an eventual sale. Impounding is regarded as a necessary part of a legal distress and goods impounded by way of a "walking possession" would not be considered "impounded", rendering the distress unlawful.[84] Given the apparent popularity of walking possession agreements[85] and the potential hardship that could be caused to innocent third party purchasers should the landlord be unable to pass good title, this issue ought to be clarified.

If goods are impounded off the premises, they are considered in the custody of the law while on their way to the pound and while in the pound. Their removal and retention in a pound is normally obvious to anyone, so impoundment in such circumstances is effective against all parties, not just the tenant. If the goods are impounded off the demised premises, the landlord is responsible for selecting a suitable pound and is responsible for any damage to the chattels which occurs if it is not.[86]

While impounded, the goods are in the custody of the law but the property interest in the goods remains vested in the owner until they are sold under distress. Until the sale, the landlord has only an inchoate right in them.[87]

D. THE SALE

At common law, the landlord had a right to distrain goods but no right to sell them. Distress was levied in order that the landlord could attempt to force payment of rent arrears by inconveniencing the tenant through seizing and holding the goods until the rent was paid. This limited remedy was found to be unsatisfactory, as often the landlord would be put in a position of paying to seize and store the goods and the tenant still would not or could not pay. In response

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[82]*Abingdon R.D.C.* v. *O'Gorman*, [1968] 2 Q.B. 811 (C.A.). This case has been followed in Alberta: *Westchester Equities* v. *Thorne Riddell Inc.* (1988), 57 Alta. L.R. (2d) 241 (Q.B.).

[83]A 1988 Alberta decision, dealing with walking possession agreements, held that the third party had to have actual or implied knowledge of the impounding before liability for pound breach could be imposed upon the third party: *Westchester Equities* v. *Thorne Riddell Inc.* (1988), 57 Alta. L.R. (2d) 241 (Q.B.). The court also noted that pound breach had formerly been an indictable offence and that the action for treble damages had originally been a penal action. The court held that such consequences must have called for the third party to have actual knowledge of the impounding before importing any liability to him or her.

[84]The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 58-60.

[85]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 32.

[86]*Wilder* v. *Speer* (1838), 8 Ad. & E. 547; 112 E.R. 945 (Q.B.).

[87]*King* v. *England* (1864), 4 B. & S. 782; 122 E.R. 654 (Q.B.).

to the concerns of landlords, section 1 of the *Distress for Rent Act, 1689*[88] was enacted to give landlords the right to sell distrained goods for arrears of rent. A slightly more modern version can now be found in section 45 of *The Landlord and Tenant Act*.

It should be noted that the landlord "*may* lawfully sell the goods"; the language is not mandatory and no action lies against a landlord who does not exercise the right of sale.[89]

If a landlord distrains, no other action may be taken against the tenant for the arrears of rent until the goods distrained have been sold. It does not matter that the goods distrained are insufficient to satisfy the arrears as, once the goods have been distrained, the debt from the tenant is suspended, even though the property interest in the goods remains with the tenant until the sale.[90] After the goods are sold, the landlord may begin an action if the proceeds of the sale were insufficient to satisfy the amounts owing. In some circumstances, the landlord may make a second distress for the same rent.[91]

1. Prerequisites to Sale

Section 45 of *The Landlord and Tenant Act* provides that no sale can take place "within five days next" after the taking of the goods and giving notice of the distress. The section does not indicate what constitutes adequate notice, other than that it must indicate "the cause of the taking" and must be "left at the dwelling house or other most conspicuous place on the premises charged . . . ."[92] The intent, presumably, is to provide the tenant with an adequate opportunity to replevy the goods or to tender the arrears and costs and to provide a clear indication of what is happening to the property. Section 1 of *The Distress Act*, on the other hand, requires that a written demand be given to the tenant stating the amount owing and the costs and charges, together with a copy of the regulations dealing with the fees and charges. It is arguable whether bare compliance with that section constitutes sufficient notice for the purpose of section 45 of *The Landlord and Tenant Act*. Adequate notice for a distress sale should include the amount of the rent claimed to be in arrears (otherwise the tenant is not put in a position to contest the amount claimed by the landlord under section 60 of *The Landlord and Tenant Act*), an inventory of the goods seized, the place of impoundment (if off the demised premises), and the time and place of the sale if the goods are not replevied or the arrears and costs paid. Most of those ingredients were required by the English *Distress for Rent Act, 1689*[93] but perhaps this should be clarified in the Manitoba legislation.

The tenant or owner of the goods has five days to replevy the goods.[94] If the tenant or owner of the goods does not do so, the landlord can begin sale proceedings. After the expiration of the five days,

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[88] *Distress for Rent Act, 1689*, 2 Wm. & Mary, c. 5.

[89] *Philpott* v. *Lehain* (1876), 35 L.T. 855 (C.P.).

[90] *Lehain* v. *Philpott* (1875), L.R. 10 Exch. 242.

[91] At common law, a landlord has the power to make a second distress in case the first was void, insufficient or the tenant acted to prevent the landlord from successfully distraining for the full amount owing. However, a second distress is not justified where there were enough chattels present on the premises upon the first distress to satisfy the amounts owing. The issue is discussed in Williams and Rhodes, *Canadian Law of Landlord and Tenant* (6th ed. 1988) 8-46 to 8-48.

[92] "The cause of the taking" presumably means the amount of the rent due. The English cases say that the notice should also include an inventory of the goods taken, the place of the impounding (if off the demised premises), and the time when the goods will be sold unless replevied or the arrears and costs paid.

[93] *Distress for Rent Act, 1689*, 2 Wm. & Mary, c. 5.

[94] The five days must be calculated exclusive of the day of the taking and of the day of the sale. E.g., *Robinson* v. *Waddington* (1849), 13 Q.B. 753; 116 E.R. 1451.

> . . . the person distraining shall cause the goods and chattels so distrained to be appraised by two appraisers, who shall first be sworn to appraise the same truly, according to the best of their understandings, a memorandum of which oath is to be endorsed on the inventory, ...[95]

Manitoba and English law now diverge on this point. Although an appraisal was required in England under the *Distress for Rent Act, 1689*, it is no longer required before an English sale unless the tenant requests it in writing. If an appraisal is requested, it will be undertaken at the tenant's expense.[96] In Manitoba and several other Canadian jurisdictions,[97] appraisers must be sworn and a memorandum of oath must be endorsed on the inventory. Other jurisdictions only require the appraisers to be sworn and do not require the memorandum of oath.[98] The Manitoba Act does not specify who may administer the oath, but the Manitoba Court of Appeal has held that the officer conducting the proceedings is competent to do so.[99]

The Act does not require that the appraisers be professionals, and the only restrictions would seem to be that the two appraisers chosen be reasonably competent[100] and that the distraining party not be one of them.[101] It would again seem preferable to require statutorily that the goods be appraised by an independent and certified appraiser. If that stipulation were put in place, perhaps there would be no need to require two of them.

2. Location of the Sale

The sale can be held on the leased premises[102] or at a public auction house or some other suitable location. The landlord will generally have the choice as to where the sale will take place, with one exception. The tenant or owner of the goods may effectively veto the holding of the sale at the leased premises and may require that it be held at some other location. If the tenant or owner of the goods exercises this right, that person is responsible for the "costs and charges attending the removal and any damage to the goods and chattels arising therefrom . . . ."[103]

3. Manner of Sale

The landlord can also choose the manner of sale, as long as the goods and chattels are sold ". . . for the best price which can be got for the same".[104] Logically, this would mean the highest net proceeds possible, so a landlord would be wise not to choose an expensive method of sale unless the difference in the sale proceeds is more than sufficient to cover the extra costs of the

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[95]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 45.

[96]*Law of Distress Amendment Act, 1888*, 51 & 52 Vict., c. 21, s. 5.

[97]New Brunswick: *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1, s. 36(2); Ontario: *The Landlord and Tenant Act*, R.S.O. 1980, c. 232, s. 53; and the Yukon Territory: *Landlord and Tenant Act*, R.S.Y.T. 1986, c. 98, s. 31(2).

[98]Nova Scotia: *Tenancies and Distress for Rent Act*, R.S.N.S. 1967, c. 302, s. 2; and Prince Edward Island: *Landlord and Tenant Act*, R.S.P.E.I. 1974, c. L-7, ss. 47 and 48.

[99]*Dewar* v. *Clements* (1910), 20 Man. R. 212 (C.A.).

[100]*Roden* v. *Eyton* (1848), 6 C.B. 427; 136 E.R. 1315 (C.P.); *Clarke* v. *Holford* (1848), 2 Car. & K. 540; 175 E.R. 224..

[101]*Westwood* v. *Cowne* (1816), 1 Stark 172; 171 E.R. 436 (K.B.).

[102]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 43(4).

[103]*The Distress Act*, C.C.S.M. c. D90, s. 7(2).

[104]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 45.

sale.[105] The landlord is also not allowed to impose conditions on the sale which would prevent the goods from being sold at their best price.[106]

If goods of a third party are involved and this is known to the landlord, the landlord has the choice of which goods are to be sold to satisfy the arrears. There is no requirement that the tenant's goods be sold first.[107]Miller Brothers v. *Twohey* (1904), 40 N.S.R. 424 (C.A.).» This could result in some of the tenant's goods being returned unsold and/or the tenant receiving an overplus at the expense of the third party's property. An action would then have to be initiated against the tenant to recover the value of the third party goods which had been seized and sold. While most third party goods are exempt from seizure, and most of those not exempted involve situations where collusion to avoid distress is a reasonable possibility, this rule could potentially cause injustice in certain situations. There would appear to be no valid reason why a landlord, who has knowledge that some of the distrained goods belong to a third party, could not first satisfy the arrears of rent from the sale of the tenant's goods before proceeding to sell the goods belonging to the third party. Perhaps the third party should have some recourse against the landlord where he or she can prove the goods were sold "unnecessarily".

Until the actual sale, the property interest remains in the tenant or owner of the goods. At the sale, the landlord has the power to confer good title on a purchaser, even where the distress was excessive or irregular. The landlord cannot confer good title where the distress was illegal.[108]

The landlord, or his or her agent,[109] may not purchase any of the items even if their offer is the highest bid at the public auction.[110] If the landlord purports to purchase the goods, no property interest passes.[111] In light of the protections inherent in a public auction, it seems odd to us that a high bid from the landlord should be excluded. We would tentatively favour the view of the Law Reform Commission of British Columbia that landlords should be able to bid at public auctions.[112] This would also accord with the position of secured creditors realizing under *The Personal Property Security Act.*

Once the goods are sold, the proceeds of the sale are to be applied to satisfy the rent arrears and expenses. The landlord is required to hold any "overplus", that is, any proceeds which remain after payment of the rent and the expenses,[113] "for the owner's use" and the landlord is to ". . . pay the same over to him on demand."[114] If the arrears and costs have been satisfied and goods remain unsold, the landlord must return those goods to the premises from which they were taken or leave them in a convenient place and notify the tenant or owner.[115]

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[105]The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 62.

[106]*Hawkins* v. *Walrond* (1876), 1 C.P.D. 280.

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[108]The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 63.

[109]*Barlow* v. *Breeze* (1916), 31 D.L.R. 280 (B.C.C.A.).

[110]E.g., *King* v. *England* (1864), 4 B. & S. 782, 122 E.R. 654 (Q.B.).

[111]*King* v. *England* (1864), 4 B. & S. 782; 122 E.R. 654 (Q.B.). However, the landlord and the tenant may agree to transfer certain items at a valuation price as satisfaction for all or part of the rent: *Woods* v. *Rankin* (1868), 18 U.C.C.P. 44 (C.A.).

[112]See s. 7(7) of their draft Rent Distress Act, reproduced in Appendix C: Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 46.

[113]*Lyon* v. *Tomkies* (1836), 1 M. & W. 603; 150 E.R. 576 (Exch.); *Knight* v. *Egerton* (1852), 7 Exch. 407; 155 E.R. 1007.

[114]*The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 45.

[115]*Evans* v. *Wright* (1857), 2 H. & N. 527; 157 E.R. 217 (Exch.); *Pettit* v. *Kerr* (1889), 5 Man. R. 359 (C.A.).

If the sale occurred on the demised premises, the purchaser of the goods must remove them within a reasonable time or be liable as a trespasser.[116]

E. COSTS

In Manitoba, section 45 of *The Landlord and Tenant Act* provides that a landlord may apply proceeds of sale to "the charges of the distress, appraisement and sale". *The Distress Act* requires any person levying a distress to give to the person whose goods are being distrained a written notice of the distress "demanding payment of the amount owing and in respect of which the distress is made and of all costs and charges of the distress, ..."[117] The allowable charges are prescribed by regulation. The Act goes on to require that the person giving the notice provide the tenant with a copy or extract of the regulation which prescribes the allowable fees and charges. It is unlawful to charge or receive costs other than those specified in the regulation;[118] however, the Act also permits express agreements entered into for the purpose of varying those costs.[119]

We note that the regulation setting out the permitted costs was last revised in 1982[120] and wonder whether it should be updated. We also wonder how often parties agree to contract out of the regulation and, indeed, whether there is a need for government regulation of these costs. Perhaps a requirement that such costs be reasonable would be sufficient.

F. REMEDIES

Landlords, tenants and third parties involved in a distress have certain remedies available to them with respect to disputes that arise during the course of the distress. For convenience, the remedies will be discussed in terms of the parties to whom they are available.

1. Landlord's Remedies

A landlord will have no remedy against a tenant who has used lawful means to avoid a distress. Such lawful means would include limiting the amount of distrainable property kept on the premises or securing the premises against entry. A tenant can deny a landlord lawful entry by refusing to unlock the doors of a business and by making sure that windows and any other means of entry are closed or locked. As we have seen, even if the landlord has a key to the premises, it may not be used to unlock the premises to gain entry. To do so would constitute trespassing and render the distress illegal.

Keeping in mind the public's interest in maintaining the peace, it might be advisable to enact statutory provisions which allow a landlord, whose efforts to enter are being frustrated, to apply to a judicial officer for permission to enter the demised premises. The statute could also stipulate that a sheriff or other peace officer attend with the landlord when the sanctioned entry is to occur. Another option might be to simply allow the landlord to use his or her own key. In

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[116]See *The Landlord and Tenant Act*, C.C.S.M. c. L70, s. 43(4); *Pitt* v. *Shew* (1821), 5 B. & Ald. 206; 106 E.R. 913 (K.B.).

[117]*The Distress Act*, C.C.S.M. c. D90, s. 1.

[118]*The Distress Act*, C.C.S.M. c. D90, s. 2.

[119]*The Distress Act*, C.C.S.M. c. D90, s. 5.

[120]Man. Reg. 56/82; re-enacted as Man. Reg. 316/87 R.

certain circumstances, breaking into the demised premises may be justified. Presumably, the tenant is aware of the landlord's right to distrain for non-payment of rent, having, of course, signed the lease. Why should the tenant be able to frustrate that right by locking the premises, leaving the landlord with no means of obtaining entry to exercise his or her right of distress?

If the tenant has fraudulently removed goods to avoid their being distrained, subsection 40(1) of *The Landlord and Tenant Act* gives the landlord the right to seize such goods within thirty days of their fraudulent removal. Should it be necessary, section 41 of *The Landlord and Tenant Act* allows the landlord to gain entry into the building by calling for the assistance of a peace officer to break into it. Under section 41 of *The Landlord and Tenant Act*, a penalty of double the value of the goods fraudulently removed can be claimed against the tenant and any person knowingly assisting the tenant.[121] The landlord appears to be able to claim the full amount of punitive damages from each individual involved. Thus, if ten people were to remove goods worth a total value of $1,000, the landlord apparently could sue all ten for $2,000 each, recovering $20,000 in all. The wording is mandatory and there appears to be no discretion not to award the punitive damages.

If, while lawfully distraining, a landlord or his or her agent is obstructed by any person, the landlord may have a civil action for assault or battery. The person obstructing may also be guilty of a criminal offence under section 129 of the *Criminal Code*, which provides as follows:

> 129. Everyone who
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> . . .
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> (c) resists or wilfully obstructs any person in the lawful execution of a process against lands or goods or in making a lawful distress or seizure,
>
> is guilty of
>
> (d) an indictable offence and is liable to imprisonment for two years, or
>
> (e) an offence punishable on summary conviction.[122]

If the tenant or any other person takes back goods that have been seized but not yet impounded, the landlord may have an action against that person in rescue. A landlord has no property interest in the seized goods as title to the goods remains with the owner of them until sale; therefore, a landlord would have no action for conversion or detinue and would be limited to this action. The action will lie if the distress was lawful, and even if it was irregular or excessive. If the landlord's distress was illegal,[123] the tenant or other owner has the right to rescue the goods and no action lies against him or her.

In England, rescue is both a common law offence and, under section 3 of the *Distress for Rent Act, 1689*, a civil wrong for which punitive (treble) damages are recoverable. There is no

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[121] However, third parties are free to remove their goods from the demised premises: e.g., *Pidgeon* v. *Milligan* (1871), 13 N.B.R. 459 (C.A.); *Foulger* v. *Taylor* (1860), 5 H & N. 202; 157 E.R. 1157 (Exch.).

[122] *Criminal Code of Canda*, R.S.C. 1985, c. C-34, s. 129.

[123] A distress will be illegal if the landlord or his or her agent was not entitled to distrain at all or if there was some irregularity at the outset. Examples of the former would be that there was no rent owing or that the tenant had made a valid tender of the amounts owing before the distress. Examples of the latter would be where there had been a forced entry or where privileged goods were seized. An irregular distress is one which begins lawfully; in other words, there are arrears owing and the initial entry was lawful, but one or more irregularities occur after the lawful entry, such as a faulty notice or an improper appraisement. An excessive distress is one where the amount of goods seized is manifestly valued in excess of the amount of arrears and costs claimed.

requirement that the landlord prove special damages.[124] In Manitoba, rescue is dealt with under section 44 of *The Landlord and Tenant Act*:

> Upon any pound breach or rescue of goods or chattels distrained for rent the person offending, or the owner of the goods distrained, in case the same are afterwards found to have come to his use or possession, shall forfeit to the person aggrieved $20. in addition to the damages sustained by him.

In Manitoba, therefore, the landlord may recover damages, but the punitive damage aspect of rescue is considerably less serious than in England.

Once the seized goods have been impounded, it is unlawful for the goods to be retaken. Any person retaking impounded goods is liable for pound breach. Unlike in rescue, it is no defence in pound breach that the distress was illegal. Impounded goods are in the custody of the law and retaking them can never be justified.[125] As in rescue, the landlord's only available action against someone removing impounded goods is under section 44. There can be no action by the landlord in conversion because the property interest in the impounded goods remains in the tenant or owner of the goods until they are sold.

While the retaking of impounded goods is always unlawful, in some circumstances the person retaking such goods will nevertheless not be liable for pound breach. To be found liable, the person doing the retaking must have been aware that the goods were impounded. Confusion as to whether the goods have been impounded could arise where the goods are impounded on the demised premises, especially when they have been left in their original locations, or in the case of a "walking possession" agreement. In such situations, a tenant who removes the goods will be liable for pound breach but a third party who removes the goods without knowledge of the impounding will not.[126]

In England, pound breach is both an indictable offence at common law and a civil wrong where, as in rescue, treble damages are recoverable without proof of special damages.[127] In Manitoba, pound breach, like rescue, is dealt with under section 44 of *The Landlord and Tenant Act* and the successful landlord is entitled only to twenty dollars in punitive damages in addition to the damages sustained.

It appears to us that the provisions for punitive damages for pound breach and rescue are outdated in two respects. First, there is no room for judicial discretion to award (or not award) them in appropriate cases; indeed, the awarding of punitive damages is a rare occurrence in most areas of Manitoba law. Second, assuming that punitive damages are appropriate, the amount of twenty dollars seems unrealistic and wholly unpunitive.

2. The Remedies of the Tenant or Owner of the Goods

The tenant or owner of the goods has three basic remedies. First, the tenant or owner of the goods can attempt, in certain circumstances, to retake the goods; second, they can attempt to replevy the goods; or, third, they can sue the landlord for any damages suffered. The availability of each of these remedies depends upon whether the distress was illegal, excessive or irregular.

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[124] *Kemp* v. *Christmas* (1898), 79 L.T. 233 (C.A.).

[125] *Cotsworth* v. *Bettison* (1696), 1 Ld. Raym. 104; 91 E.R. 965 (K.B.).

[126] *Abingdon R.D.C.* v. *O'Gorman*, [1968] 2 Q.B. 811 (C.A.); *Westchester Equities* v. *Thorne Riddell Inc.* (1988), 57 Alta. L.R. (2d) 241 (Q.B.).

[127] *Distress for Rent Act, 1689*, 2 Wm. & Mary, c. 5, s. 4.

If a distress was illegal, the tenant or owner of the goods may retake the goods at any time before they are impounded. They will be liable for rescue, however, if they retake not-yet-impounded goods which were seized during an irregular or excessive distress.[128]Supraç®üö®» n. 123 for an explanation of an "illegal", "irregular" or "excessive" distress.»

Once goods have been impounded, the owner of them may only retake them in the unusual circumstance that the landlord has taken the goods out of the pound for the purpose of using them. Use of distrained goods by the landlord is illegal, and the tenant or owner of the goods may retake possession of such goods without being liable for either pound breach or rescue.[129]

The second option available to the tenant is to seek to replevy the goods. This option is only available where the distress was illegal as the action is available generally to anyone who claims that their goods have been taken from them unlawfully. Replevin is the name applied to both stages of a two-stage process. First, the tenant or owner of the goods must allege that the goods were wrongfully taken and ask the court to have the goods returned pending a hearing of the matter. Before the goods can be returned, the tenant or owner must provide sufficient security for the rent alleged to be owing and the costs of the action and undertake to pursue an action against the distrainer to decide the legality of the seizure. Second, the tenant or owner of the goods must, in fact, undertake such an action.

The third remedy available to a tenant or owner of goods is to pursue a claim for damages. Again, the damages recoverable will depend on the characterization of the distress.

The *Statute of Marlborough* (1267) and subsection 19(2) of *The Landlord and Tenant Act* both provide that distresses "shall be reasonable". Subsection 51(1) of *The Landlord and Tenant Act* provides that a "distrainer who takes an excessive distress, or takes a distress wrongfully, shall be liable in damages to the owner of the goods or chattels distrained." There is no provision for temporary deprivation of the goods[130] but, if all have been sold, the tenant's damages will be the value of the goods, after the rent and proper expenses have been deducted.[131]

If a distress was irregular, section 50 of *The Landlord and Tenant Act* provides that:

> . . . the distress itself shall not be therefor deemed to be unlawful, nor the person making it deemed a trespasser ab initio, but the person aggrieved by the irregularity may recover by action full satisfaction for the special damage sustained thereby.

There is no provision for punitive damages, and a plaintiff must prove special damage to recover even nominal damages. If special damage cannot be proved, the defendant is entitled to the verdict.[132]

The situation is more complicated where all, or part, of the distress was illegal. At common law, if a distress is entirely illegal, as in cases where no rent is owing or the landlord refuses the tendered arrears prior to the distress, the landlord is a trespasser *ab initio* and the tenant or owner of the goods is entitled to the full value of the goods lost without any deduction for any rent which may have been owing.[133] Subsection 51(2) of *The Landlord and Tenant Act*

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[129]*Smith* v. *Wright* (1861), 6 H. & N. 821; 158 E.R. 338 (Exch.).

[130]See The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 69.

[131]*Wells* v. *Moody* (1835), 7 C. & P. 59; 173 E.R. 26 (Exch.).

[132]E.g., *Lucas* v. *Tarleton* (1858), 3 H. & N. 116; 157 E.R. 409 (Exch.).

[133]E.g., *Grunnell* v. *Welch*, [1906] 2 K.B. 555 (C.A.).

now provides that, where the distress was illegal because no rent was in arrears and the goods distrained have been sold, the tenant or owner of the goods may "recover full satisfaction for the damage sustained by the distress and sale".[134] In other cases of illegal distress, such as where the initial entry was illegal, the landlord's actions presumably amount to making a distress "wrongfully" within the meaning of subsection 51(1) of *The Landlord and Tenant Act*. The tenant would, therefore, be entitled to damages equivalent to the value of the goods minus the rental arrears and costs incurred.[135]

Where a distress is only partly illegal, such as where privileged goods are among those goods seized and sold, damages are only recoverable for that part of the distress which was illegal.[136]

G. PRIORITY OF CREDITORS

Some uncertainty exists as to how to determine the priority disputes between distraining landlords and creditors with security interests registered under *The Personal Property Security Act*.[137] There are also concerns as to whether the priority structure is fair to all parties.

The case law on point would suggest that distress for rent, when levied by actual or constructive seizure, confers a lien in favour of the landlord on the tenant's property. However, the lien created does not fall within the scope of *The Personal Property Security Act*,[138] with the result that the landlord does not have to register his or her interest under that Act. No statutory priority rules apply to determine the result of a priority conflict.[139] Conflicts would thus have to be solved by referring to pre-Personal Property Security Act law and by considering any possible effect that the Act has had on the prior case law.

Prior to *The Personal Property Security Act* coming into force, a landlord's priority interest in the tenant's goods varied according to the nature of the security interest held by the competing creditor. For example, a distraining landlord had priority over a chattel mortgagee.[140] The landlord's priority over a conditional sale creditor, however, extended only to the tenant's interest in those goods.[141] In the *Commercial Credit Corp.* case,[142] the Ontario Court of Appeal upheld the landlord's priority interest over that of a chattel mortgagee's. However, the present status of other pre-Personal Property Security Act rules has not been judicially determined.

One problem that arises when trying to apply pre-Personal Property Security Act rules is that *The Personal Property Security Act* has abolished distinctions between former chattel security devices and created the unitary notion of a "security interest". It may be argued that the

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[134]In England, in situations where no rent was in arrears, the tenant or owner of the goods is entitled to damages equal to double the value of the goods sold: *Harvey* v. *Pocock* (1843), 11 M. & W. 740; 152 E.R. 1003 (Exch.).

[135]A tort of "maliciously suing out process" has been recognized in situations where executions of judgments have been obtained through falsehood or malice: *Feinstein* v. *Paulin-Chambers Co. Ltd.*, [1921] 1 W.W.R. 554 (Man. K.B.); *Clissold* v. *Cratchley*, [1910] 2 K.B. 244 (C.A.). *Quaere* whether such an action would lie for a distress undertaken in similar circumstances?

[136]*Distress for Rent Act, 1689*, 2 Wm. & Mary, c. 5, s. 4.

[137]*The Personal Property Security Act*, C.C.S.M. c. P35.

[138]*Braukmann Holdings Limited* v. *Commercial Credit Corp.* (1981), 1 P.P.S.A.C. 301, at 302 (Ont. C.A.).

[139]R.H. McLaren, *Secured Transactions in Personal Property in Canada*, Vol. 1 (1979) 6-26.10(10).

[140]R.H. McLaren, *Secured Transactions in Personal Property in Canada*, Vol. 1 (1979) 6-26.10(11).

[141]R.H. McLaren, *Secured Transactions in Personal Property in Canada*, Vol. 1 (1979) 6-26.10(11) and 6-26.10(12).

[142]*Braukmann Holdings Limited* v. *Commercial Credit Corp.* (1981), 1 P.P..S.A.C. 301, at 302 (Ont. C.A.).

statutory abolition of the old distinctions has made the old case law on priorities of various forms of chattel securities inapplicable in Manitoba.[143] However, the contrary position can also be persuasively argued, leaving the state of the law uncertain. Such uncertainty is clearly undesirable.

The Ontario Commission recognized the problems with priorities and recommended reform of the area:

> In our view, all forms of security interest within the contemplation of that Act [*The Personal Property Security Act*], including those of conditional vendors and chattel mortgagees, should enjoy priority over the landlord's right to a rent execution [distress], subject to the landlord being able to pay the amount owing to the secured creditor and being subrogated to his interest in the property, and having his right of seizure preserved. If the landlord's interest were to be given priority over that of persons holding secured interests, conflicts could arise as there would be an incentive on the part of the latter to take proceedings to petition a tenant into bankruptcy, thus stopping the rent execution and leaving the landlord with his statutory lien. We recommend that the priority of security interests under *The Personal Property Security Act* over that of the landlord claiming under a rent execution be provided for in *The Landlord and Tenant Act*.[144]

[143]R.H. McLaren, *Secured Transactions in Personal Property in Canada*, Vol. 1 (1979) 6-26.10(17).

[144]Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976) 220.

CHAPTER 3

OPTIONS FOR REFORM

In Chapter 2, we expressed serious concerns about the present state of the law of distress in commercial tenancies. In this Chapter, we consider methods of reforming this area of the law. We also address a more fundamental question: Should reform even be attempted? Can a case be made for the outright abolition of the remedy?

A. REFORM DISTRESS

In 1968, the Ontario Law Reform Commission recommended the abolition of distress with respect to residential tenancies,[1] and that recommendation was implemented in 1969. However, in its 1976 *Report on Landlord and Tenant Law*, it advocated the reform rather than the abolition of distress for rent law in non-residential tenancies.

> The remedy of distress for default in the payment of rent should be retained insofar as it relates to non-residential tenancies. The law governing the right of distress should, however, be restated in order to ensure a greater degree of fairness to all parties affected by its operation while at the same time achieving conformity with modern commercial requirements.[2]

In its 1981 Working Paper, *Distress for Rent and Other Debts*, the British Columbia Law Reform Commission tentatively recommended that distress for rent be abolished.[3] However, after receiving submissions and opinions, mostly from landlords who sought retention of the remedy, the Commission withdrew from that original recommendation and stated instead:

> We believe it is possible to achieve something of a middle ground and develop a new *Rent Distress Act* which:
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> (a) meets a majority of the concerns that led us to a tentative conclusion that abolition of distress was called for;
>
> (b) retains those features of the existing law that landlords see as most valuable;
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> (c) reflects more clearly existing practices in relation to distress;
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> (d) eliminates a number of anachronistic features of the existing law which, it is common ground, should not be retained.[4]

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[1]Ontario Law Reform Commission, *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies* (1968).

[2]Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976) 225.

[3]Law Reform Commission of British Columbia, *Distress for Rent and Other Debts* (Working Paper #29, 1980) 46.

[4]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 36.

The Commission, however, maintained its position that, in principle, distress should be abolished and that the draft Act should serve only as an interim measure.[5] The Commission was of the view that:

> . . . [s]uch a reconsideration might take place after both the new Act and a *Personal Property Security Act* have been in force for five years. The focus of this review would be the extent to which landlords take consensual security under the *Personal Property Security Act* and how well it has served their interests, the extent to which landlords continue to rely on distress and the operation of the new regime generally.[6]

The aim, as the Law Reform Commission of British Columbia put it, would be to "rationalize and restate the law."[7] Basically, *The Distress Act* and the relevant sections of *The Landlord and Tenant Act* would be repealed and a comprehensive *Distress for Rent Act* would be enacted. The present common law and statutory rules which are considered desirable would be codified, while the shortcomings and imperfections of the current law would be amended into new statutory provisions. While all of the desired changes could be included in the one Act, it suggested implementing some reforms in other legislation; for example, the issue of priorities could be dealt with in *The Personal Property Security Act.*

One interesting feature of the Draft Act, which we attach as Appendix C to this Discussion Paper, is that it is very short (twelve sections) and simple. To a certain extent, those virtues were achieved by an incorporation of the law from other areas. For example, all of the common law rules relating to entry were proposed to be replaced by draft section 4, which reads:

> A landlord acting under a right of distress may enter the rented premises and seize goods by any means that may lawfully be used by a sheriff acting under the authority of a writ of seizure and sale.

Other aspects of the draft Act are outlined below:

1) With respect to what goods can be seized, the draft Act rejects the common law of distress in favour of execution law. Therefore, only goods which are located on the demised premises and which can be seized under a writ of seizure and sale can be seized in a distress.[8] This is also a priority rule which effectively subordinates the landlord's claim to prior security interests and other proprietary interests.

2) "Walking possession" agreements would effectively be treated as chattel mortgages with a requirement that, to be effective against third parties, they must be registered in compliance with their then proposed Personal Property Security Act. The draft Act would require that a "walking possession" agreement be evidenced by a notice of seizure in which is set out an inventory, the landlord's identity and that of the tenant or any other person having the physical custody and control of the goods, the location of the demised premises, the date of seizure and the tenant's right of redemption together with the amount owing. This notice would have to be given to the tenant no later than 5 days after the seizure and registered in the prescribed office.

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[5]To date, none of the British Columbia Commission's recommendations have been implemented.

[6]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 36. To date, the recommendations of the Commission have not been implemented. It should also be noted that, at the time of their report, British Columbia had not enacted personal property security legislation. The Commission was, in fact, recommending legislation similar to Manitoba's *Personal Property Securtiy Act* (see p. 27 of the above-mentioned report).

[7]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 23.

[8]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 39.

3) "Wrongful seizure" is expressly defined and provision is made for an aggrieved person to sue for damages, with the court having authority, in extreme cases, to award punitive damages. Third party rights are better protected both by this definition and by the imposition of execution law with respect to what goods can be seized.

4) As in *The Personal Property Security Act*, the manner of sale is governed by the concept that the realization procedures must be "commercially reasonable". A landlord may purchase the goods if bought at a public sale or if sanctioned by the court. The section also clarifies the status of the quality of title of goods sold following a wrongful seizure or a "walking possession" agreement.

5) In the case of tenant misconduct, such as pound breach or fraudulent or clandestine removal of goods, the court can order that possession of the goods be delivered to the landlord. The provision also authorizes the award, in appropriate situations, of solicitor and client costs and exemplary damages.[9]

Many of the recommendations made by the Ontario Law Reform Commission later found their way, in one form or another, into British Columbia's model *Rent Distress Act*. There were, however, a few notable differences between the reform options put forth by the two provinces. The Ontario Commission recommended[10] that:

1) the term "distress" be abandoned in favour of "rent execution";

2) rent execution be levied by the landlord only after obtaining an *ex parte* order. The judge would be empowered to fix an amount payable by the landlord as security. In fixing the amount of security, consideration would be given to the costs of the rent execution and any damages resulting to the tenant;

3) rent execution be carried out by a sheriff, deputy sheriff, or sheriff's officer (as opposed to the British Columbia provision giving the landlord the same authority as "a sheriff acting under the authority of a writ of seizure and sale");

4) specific notice requirements be spelled out in the statute;

5) the landlord be allowed to follow fraudulently removed goods for 30 days as long as the goods had not been sold to a bona fide purchaser for value prior to the rent execution;

6) fraudulent removal of goods by a tenant be treated as an offence punishable on summary conviction, rather than as a civil matter entitling the landlord to double damages;

7) there be specific provisions dealing with unconditional tender, in particular, unconditional tender before seizure, after seizure but before impounding or

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[9]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 39-45.

[10]Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976) 225-229.

removal of goods, and after seizure but within 5 days of the impounding or removal;

8) there be judicial discretion to determine whether a tenant must post security before getting the goods back.

These reform proposals were to occur within the context of Ontario's existing legislation, rather than through a new statute dealing specifically with distress for rent[11].

B. ABOLISH DISTRESS

The right to distrain in commercial tenancies has been abolished in most Australian states.[12] In its 1986 *Final Report on Legislation Relating to Landlord and Tenant*,[13] the New Zealand Property Law and Equity Reform Committee recommended that distress be abolished in New Zealand altogether.

> Our conclusion is that the new legislation should not set out the landlord's right to distrain the tenant's goods, but should instead specifically abolish that right.[14]

That recommendation was based on the two concerns commonly expressed about distress: first, that the self-help nature of the remedy is objectionable and, second, that the remedy gives the landlord an unjustified priority over other creditors. Since these are generally-recognized concerns with the distress remedy, they will be dealt with individually.

1. Distress As a Self-help Remedy

Self-help remedies have a number of unique characteristics, some of which are found objectionable in modern society. The two principal objections normally raised to self-help remedies are that there is no prior judicial consideration of the merits of the case, and hence no judicial authorization to proceed with the remedy, and that there is often no requirement to give notice of a proposed course of action to the party allegedly in the wrong. The lack of notice, either through a judicial hearing involving the "defendant"[15] or through a formal warning given by the "plaintiff", will normally mean that the "defendant" will have no opportunity to get legal advice and will probably be ignorant of his or her other rights when the remedy is invoked.[16]

Other problems can be identified. Sometimes the tenant may not have a suitable remedy; damages are often not sufficient to redress wrongs that have been done. Indeed, a tenant's business can be destroyed by a wrongful distress. Some may also think it inappropriate that the

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[11]The recommendations of the Ontario Law Reform Commission have not been implemented to date.

[12]Law Reform Committee of South Australia, *Sixty-sixth Report of the Law Reform Committee of South Australia Relating to the Reform of the Law of Distress* (1983) 7.

[13]Property Law and Equity Reform Committee (New Zealand), *Final Report on Legislation Relating to Landlord and Tenant* (1986).

[14]Property Law and Equity Reform Committee (New Zealand), *Final Report on Legislation Relating to Landlord and Tenant* (1986) 71.

[15]The terms "defendant" and "plaintiff" are used here for convenience: strictly speaking, they are not appropriate designations for parties involved in self-help remedies.

[16]A somewhat analogous situation to that of the landlord and tenant can be found in debtor-creditor situations involving debentures or security agreements "payable on demand". In those situations, it is settled law that the creditor must make a "reasonable demand" for payment; the creditor cannot simply demand the money immediately and install a receiver if the payment is not forthcoming. A tenant is not similarly protected.

"wronged" party can pursue their remedy on their own, rather than through an impartial judicial officer. For example, breaches of the peace are more likely to occur where goods are seized by private citizens rather than peace officers.

The New Zealand Property Law and Equity Reform Committee saw these problems as ones which made distress law anomalous in modern society:

> The lack of warning where distress is undertaken, the relative lack of judicial or legal supervision, and the questionable effectiveness of the tenant's remedies are further matters of concern . . . . [I]t would appear to us likely that the majority of distraints are carried out without the warrant of the court, and by landlords themselves with no advice from a lawyer. Such a peremptory interference with a tenant's affairs, on the basis of a right which is not sworn to in court proceedngs [sic], is difficult to reconcile with modern concepts of debtor protection . . . . [M]uch has been made of the "self-help" nature of the remedy, and there is a question whether the exercise of the right without a court warrant might in some circumstances lead to a breach of the peace . . . .[17]

The Ontario Law Reform Commission, in its 1968 Interim Report, felt that the most crucial question to be considered with respect to distress was whether a self-help remedy was acceptable in this field of law. The Commission concluded that "the remedy is difficult to harmonize with acceptable contemporary standards of protection, without virtually destroying the remedy's efficacy as a landlord's remedy."[18] However, by the time of its 1976 Report, the Commission adopted the view that the problems implicit with distress as a self-help remedy, at least in a commercial setting, could be addressed by fundamental reform of the existing law, rather than by abolition.[19]

The Law Reform Commission of British Columbia considered this issue at some length in its 1981 Report.

> As a general rule, before a remedy against a person or his property may be enforced, two steps must be observed. First, there must be some adjudication by a court or other competent tribunal of the person's entitlement to that remedy. Second, the actual enforcement of the remedy must be entrusted to an officer of the court such as a sheriff. The reasons which underlie the general rule are fairly obvious. The first step accords with the widely accepted principle that a person should not be deprived of his property except by due process of law. The second step is related to public order. It is thought that by placing the actual enforcement process in the hands of a disinterested officer of the court, breaches of the peace are much less likely than if enforcement is left to an interested party. . . .
>
> Where distress is available, the safeguards inherent in the process described above are absent. Whether or not a levy of distress will be made is a unilateral decision by the landlord. He needs only to be satisfied in his own mind that arrears of rent are owing to start the process in motion. The actual process of seizure may be carried out by the landlord or his employee. Alternatively, he may direct a warrant to a commercial bailiff to carry out the seizure as his agent . . . . Where property is seized under a distress, the safeguards of the tenant's interest are minimal.
>
> The right of a person to enforce remedies against property directly is often referred to as a "self-help" remedy. The modern tendency of statutes is to restrict or discourage the exercise of self-help remedies . . . .
>
> It seems safe to say that the self-help nature of distress, as it presently exists, is out of step with contemporary developments designed to bring unrestrained creditor initiative within rules and procedures designed to achieve a fair and orderly realization of a debtor's assets.[20]

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[17]Property Law and Equity Reform Committee (New Zealand), *Final Report on Legislation Relating to Landlord and Tenant* (1986) 70.

[18]Ontario Law Reform Commission, *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies* (1968) 10.

[19]Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976).

[20]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 19-21.

These concerns have been echoed by other law reform commissions. The Law Commission of England discussed some of the arguments against distress in its 1986 Working Paper on *Distress for Rent*:

> Some maintain that distress is wrong in principle, arguing that it is a brutal remedy, lacking judicial control and wholly out of place in a modern legal system . . . .
>
> A number of arguments have been advanced to support the contention that distress is outdated. First, it is argued, "self-help" remedies should be discouraged as a matter of principle, since it gives an advantage to "might" rather than "right".[21]

At a later point, the English Commission went on to say that:

> . . . the only way of safeguarding against the inevitably inherent opportunities for abuse is to build in a greater role for the courts. Because self-help remedies generally are now regarded with some suspicion and disfavour, the modern trend is to impose some degree of judicial control over them.[22]

The Law Reform Committee of South Australia in its 1983 Report considered the "might versus right" point:

> . . . [I]t is our opinion that distress ought to be abolished altogether as has already been done in New South Wales, Western Australia, Victoria and Queensland. It is anachronistic at the present day. Self help is not well regarded today. It presses hardest on the so-called "submerged tenth" of the population who are least able to fight a distress or get an injunction to stop its oppressive use.[23]

It should be noted at this point that, while all five Commissions canvassed above recognized problems with the self-help nature of the remedy, only two (New Zealand and South Australia) made a final recommendation for abolition in commercial settings. The English Commission tentatively recommended total abolition, but acknowledged that partial abolition (abolition of distress with respect to residential tenancies) might be thought sufficient by some.[24] Both the British Columbia and Ontario Commissions recommended that distress be abolished in residential tenancies but felt that it could continue to exist in commercial tenancies with appropriate reforms.

It should perhaps also be noted that distress is not the only self-help remedy available to a landlord of commercial property in Manitoba where rent is in arrears. Under subsection 17(1) of *The Landlord and Tenant Act*, the landlord is given a general right to re-enter demised premises where rent has gone into arrears. Subsection 17(2) provides that a landlord may re-enter where the tenant is keeping a bawdy house on the demised premises. Section 18 regulates the common law right of a landlord to re-enter for breach of a condition or covenant. Similar objections can be made to the self-help remedy of re-entry as were made to distress. If consideration is being given to abolishing distress for rent, perhaps the right of re-entry for arrears of rent along with all rights of re-entry presently allowable should also be reconsidered.

On the other hand, a case can be made that landlords are peculiarly vulnerable creditors in need of a special remedy to protect their interests. Debts to landlords accrue regularly with the

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[21]The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 85. One qualification should be made with respect to the strong criticism advanced by the Law Commission against distress -- they were discussing distress in the context of *both* commercial and residential tenancies. Hence, their comments may have been more critical than in a purely commercial context.

[22]The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 132.

[23]Law Reform Committee of South Australia, *Sixty-sixth Report of the Law Reform Committee of South Australia Relating to the Reform of the Law of Distress*, (1983) 7-8. It should be noted that distress in residential tenancies had been abolished in South Australia in 1978.

[24]The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 137-138.

passage of time, and landlords, unlike most other creditors, cannot easily withdraw their "services" to the client. In order to withdraw the "service", the landlord must retake possession of the demised premises. That recourse may not be particularly appealing to the landlord, as the premises must then be relet; any delay in releting will mean the loss of revenue. The Ontario Commission considered this point in its 1976 Report:

> . . . .[L]andlords of commercial premises are, in one sense, more vulnerable than landlords of residential tenancies in that they ordinarily experience greater difficulty in reletting than do landlords of residential premises. Many commercial properties are suitable for specialized tenancies, and the fact that a tenant (especially one engaged in retail trade) has been unsuccessful may contribute to the problem of finding a satisfactory new tenant. Such a situation must inevitably result in a certain amount of sympathy for the commercial landlord's position.[25]

Landlords argue that distress has a number of virtues as a remedy, especially when used against those tenants who can pay. It will be seen that what landlords see as desirable features are often the very features objected to by others. The three characteristics of distress favoured by landlords are speed, simplicity and effectiveness.

Distress, it is argued, provides fast relief as no notice is required before seizure and only five days need elapse before sale. The speed of the remedy is particularly important where the landlord fears that the tenant is likely to abscond or to dispose of otherwise distrainable assets. The argument has been made that landlords need this sort of preferential remedy as they are often the last to know about a tenant's financial difficulties and thus may have to act quickly to protect their interests.[26]

The remedy in its present form is also simple (notwithstanding the often complex rules) and inexpensive. If all goes well for the landlords, they can simply employ reputable bailiffs to distrain on their behalf and, if sufficient goods are distrained, the bailiff's costs are paid by the tenant. Unlike other remedies, distress does not require the landlord to pay legal fees or make court appearances, unless something goes wrong. Landlords responding to the British Columbia Commission's 1981 Working Paper stressed this feature:

> The landlords' submissions were also unanimous in condemning ordinary litigation proceedings as expensive and time-consuming and characterized them as an unacceptable vehicle for the collection of rental arrears. Consensual security was also rejected as an acceptable alternative to distress.[27]

The mere threat of distress is often enough to "encourage" the tenant to pay the arrears. Furthermore, if the goods are indeed seized, the arrears will often then be forthcoming. Finally, if it is a situation where a tenant is unable to pay, the landlord is in a good position to quickly sell the tenant's assets to satisfy all or part of the amounts owing, usually before other creditors will have a chance to react. British Columbia landlords told the British Columbia Commission that the principal value of distress was as a tool of "persuasion" (although some might say "coercion" would be more correct):

> Essentially, we were told that the principal value of distress, as it is used today, lies not in the money that may be recovered through seizure and sale of the tenant's goods. The kind of prices that goods may bring at a "distress sale" often live up to the popular connotations of that term. Rather,

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[25]Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976) 213.

[26]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 31. Note, however, at p. 32 of this Report, that landlords admitted to being aware of the tenant's financial difficulties "well before any substantial arrears accrue." Their somewhat contradictory remarks were being made in support of distress as an "influential" tool to be used in advising their tenants.

[27]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 31. The objections to consensual security are found at p. 34 and basically state that such a development in landlord and tenant relations will make it difficult for the tenant to obtain credit if the landlord already holds various security interests in the tenant's property. Also, at p. 31, reason (13) states abolition will make it more difficult for the less credit-worthy tenants to rent business premises.

> the right of distress gives the landlord a powerful tool to persuade the tenant to satisfy his rent obligations.[28]

The Ontario Commission also dwelt on this aspect of the remedy:

> Although the remedy is not often resorted to as a means of rent recovery, it remains an effective device whereby the landlord may test the tenant's financial position when he feels himself to be insecure . . . . Rather than face the possibility of the rented premises being locked up as a result of a seizure pursuant to a distress warrant, the tenant will often pay the arrears of rent claimed. . . .[29]

In addition to the above arguments, it has also been recognized that many of the arguments against distress carry less weight in a commercial setting and that reform of the most serious problems will be sufficient to meet the major concerns with the remedy. For example, although the English Law Commission provisionally recommended abolition of distress, it acknowledged that the concerns it expressed are more serious in residential tenancies.

> The social arguments against the levying of distress against business tenants are perhaps weaker than those against distress in a residential context. There is a general feeling that rent arrears, like other business debts, are simply one of the risks run when setting up in business and that a landlord is entitled to protect his own interests as best he can if his tenant defaults . . . .[30]

> An alternative conclusion is that there is still a place for distress in modern society, but that place does not cover all the different kinds of tenancy. In particular, it may be concluded that distress is no longer an appropriate remedy in the context of residential lettings.[31]

The British Columbia Commission made similar comments.[32]

> The tentative conclusion that we set out in the Working Paper was that the landlord's common law right of distress should be abolished, leaving them to the collection rights and the contractual security devices that are available to creditors generally. We do not retreat from that view, as a statement of principle, but we are also alive to the fact that occasionally principle must bend, at least in part, to pragmatism and popular notions of what is fair and workable.
>
> The mood of the landlords is clear. They derive considerable comfort from the existence of distress and see it as a valuable tool in enforcing their just claims for rental arrears. The response from other quarters was divided and much less forceful. While such matters are not to be determined solely by counting heads, neither can the general tendency of the response be ignored.[33]

2. Distress Gives Landlords An Unjustified Priority

The Law Reform Committee of South Australia took the position in its 1983 Report that distress for rent "gives a landlord a priority which is out of touch with present day thinking."[34] A similar position was taken by the New Zealand Committee:

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[28]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 32.

[29]Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976) 213.

[30]The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 90.

[31]The Law Commission (England), *Distress for Rent* (Working Paper #97, 1986) 137-138.

[32]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 36-37.

[33]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 36.

[34]Law Reform Committee of South Australia, *Sixty-sixth Report of the Law Reform Committee of South Australia Relating to the Reform of the Law of Distress* (1983) 8.

(i) In modern conditions, there is no inherent reason why a landlord should have special powers over the tenant's goods . . . .

(ii) If any creditor is to have security rights in a debtor's goods, we think this should be conferred by contract rather than by the general law. This would ensure that the party whose goods are affected has full warning of the possible consequences of default . . . .

(iii) The principal practical effect of the law of distress may well be that the landlord takes priority over unsecured creditors, and (arguably, though this is unclear) over equitable charges and title retentions asserted by the tenant's suppliers and financiers. We are unable to see any logical justification for such a priority, or any useful social consequences which flow from it.[35]

The British Columbia Commission also considered the point in its 1981 Report.

There remains the question of why the claim of the landlord has been singled out for particularly favourable treatment and whether this should continue to be the case.

The landlord's right of distress is of great antiquity and appears to have been derived from ancient feudal law. Distress emerged in an agriculture-based economy at a time when so-called self-help remedies were a widely accepted method of enforcing legal rights. The evolution of a remedy of this kind is not surprising. In a feudal agricultural economy, it is the landlord who provides the most important item of capital that enables the tenant to conduct a farming operation. A law which recognizes the special position of the landlord in this context and provides a special remedy to assist him in the collection of his rent seems a natural consequence. Moreover, since competing creditors are likely to be few, and alternative means of securing the landlord's position through agreement rather than operation of law had not yet developed, distress could be perceived as a fair and reasonable balancing of interests.

It is doubtful if the conditions that may once have justified distress hold true today. While, no doubt, agricultural tenancies continue to exist, the vast majority of commercial tenancies which are amenable to distress involve the manufacture or sale of goods or the provision of services. It cannot be said on an *a priori* basis that the most important component of such enterprises is their business premises and that the creditor who makes that component available, the landlord, deserves a favoured legal position denied to other creditors . . . . It is, therefore, difficult to justify a body of law that invariably gives the landlord a preferred legal position.

. . . . If a landlord is in any doubt as to a prospective tenant's ability to meet his rent obligations, it is open to the landlord to take a security interest as part of the rental agreement. This supports a view that the right of distress is obsolete and unnecessary.[36]

In England, the priority of distraining landlords was considered by the Committee on the Enforcement of Judgment Debts (the Payne Committee) in its 1969 Report:

The cumulative effect of the differences which we have outlined place the landlord in a privileged position compared with other creditors, and the question arises whether these advantages can be justified . . . .

In our view, [the arguments in favour of landlord's having a special position], though formidable, are unconvincing and do not justify the landlord's priority over other creditors . . . . Only the accident of history entitles the landlord to exercise this right [distress] without first having to transform his claim into a judgment debt.[37]

The Payne Committee, after also considering other factors, recommended that distress be abolished.[38]

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[35]Property Law and Equity Reform Committee (New Zealand), *Final Report on Legislation Relating to Landlord and Tenant* (1986) 68-70.

[36]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Reprot #53, 1981) 19.

[37]*Report of the Committee on the Enforcement of Judgment Debts* (1969) Cmnd. 3909, at para. 919, 921-922.

[38]*Report of the Committee on the Enforcement of Judgment Debts* (1969) Cmnd. 3909, at para. 924.

Again, although the priority problem was recognized by all five bodies canvassed above, only three recommended abolition (South Australia, New Zealand and the Payne Committee) while the Ontario and British Columbia Law Reform Commissions felt that reform of the existing law by establishing new statutory priorities would be sufficient to meet the concerns raised.

Some of the arguments put forward by landlords to support their priority can be found in the Report of the British Columbia Law Reform Commission:[39]

> . . . The basic question posed in the Working Paper is why a landlord should, by operation of law, have a speedy self-help remedy against his tenant's property that is denied to other unsecured creditors and which gives priority over them and over many secured creditors. Some of the reasons given by landlords to justify their special position are:
>
> (1) They need the priority because they have their own obligations - bills, taxes, mortgage payments to meet. They are unlike other trade debts in that they arise out of the subject matter of the transaction.
>
> (2) The landlord is not a "mere" creditor. Contrary to the view set out in the Working Paper, the premises are the most important component of a tenant's business in a majority of cases.
>
> (3) Other "suppliers" such as workers have a statutory priority - why not landlords?
>
> (4) The priority enjoyed by a landlord may motivate him to forbear collection action, thus allowing the tenant to stay in business. This benefits everyone.
>
> . . . .
>
> (6) The consequence of a default is more drastic for a landlord than for other creditors - difficulties in reletting, repairs, etc.
>
> (7) The landlord needs special protection because he is usually the last to know of the tenant's financial difficulties.
>
> . . . .
>
> (9) Abolition of distress would add to the landlord's financial burden "with little hope of recovery." It would place a burden on small owners who cannot spread their losses over a number of properties. A landlord is far less able than other credit grantors to spread his credit risk.
>
> (10) The added burden on the landlord will be passed on to all (good) tenants and increase rental costs generally.
>
> (11) Landlords have a preference as to three months' rent in a bankruptcy (and by implication they deserve priority under provincial law).
>
> (12) The landlord's priority is not unfair to competing creditors because they have full knowledge of that priority and their exposure to risk is small.
>
> (13) The abolition of distress would force landlords to screen their prospective tenants more carefully and the less credit-worthy of them may be unable to rent business premises.
>
> . . . .[40]

[39]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981).

[40]Law Reform Commission of British Columbia, *Report on Distress for Rent* (Report #53, 1981) 30-31.

However, it should be noted that even the British Columbia and Ontario Law Reform Commissions, which both recommended retention of distress in commercial settings, rejected the view that landlords are entitled to special priority as creditors.[41]

[41]The British Columbia recommendations are found in sections 3 and 6 of the draft Rent Distress Act, attached as Appendix C. By section 3, a distraining landlord would normally be put in the same priority position as an execution creditor. The Ontario Law Reform Commission recommended that *The Landlord and Tenant Act* be amended to provide that:

> (a) The landlord's claim to personal property under a rent execution should have priority over the interest in such property of a person claiming under a writ of execution against the tenant; and
>
> (b) All forms of security interest under *The Personal Property Security Act* should have priority over the landlord's right to a rent execution [distress], subject to the landlord being able to pay the amount owing to the secured creditor and being subrogated to his interest in the property, and having his right of seizure preserved.

Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976) 227.

CHAPTER 4

CONCLUSION

In this Discussion Paper we have raised a number of questions concerning the law which governs the remedy of distress in commercial tenancies. Indeed, we have questioned whether there is a case for the continued existence of the remedy at all. We have done so without any preconceptions as to the "right" answers. It is our hope that this Discussion Paper will provoke a consideration of the matters which are raised in it and will result in written submissions to us.

In order to assist the potential commentator, we have formulated the following list of specific questions; where applicable, reference is also made to the parts of the Discussion Paper where the issues are discussed. However, this list is not intended to be exhaustive. We would welcome comments on all aspects of distress in commercial tenancies, whether raised in this Discussion Paper or not.

QUESTION 1

Should distress in commercial tenancies be abolished?

QUESTION 2

If distress in commercial tenancies should not be abolished,

(a) should a new statute be enacted to codify and reform the remedy;

(b) should the existing legislation be amended to correct anomalies and omissions found in the present law; or

(c) should the present state of the law be left untouched?

QUESTION 3

If distress in commercial tenancies should not be abolished but should be reformed,

(a) should the requirement that the tenant be in possession be changed? (p. 4)

(b) should the time limitations applicable to the remedy be changed? (p. 4,7)

(c) should the rule preventing a landlord from using proceeds of a distress sale for any arrears which may have arisen since the distress be changed? (p. 6)

(d) should "rent" be defined? (p. 7)

(e) should "demised premises" be defined? (p. 9)

(f) should the times during which distraint may take place be clarified or changed? (p. 10)

(g) should the rules respecting the taking and sale of third party goods be changed? (p. 11)

(h) should the nature of goods which are exempt from distress at common law be changed or codified? (p. 12)

(i) should the nature of goods which are statutorily exempt from distress be changed? (p. 13)

(j) should the notice requirement surrounding the exercise of the remedy be changed? (p. 13)

(k) should the rules respecting the manner by which landlords may enter leased premises be changed? (p. 14)

(l) should the law respecting constructive seizure and "walking possession" agreements be changed? (p. 15)

(m) should the requirement for sworn appraisals be changed? (p. 19)

(n) should the remedies surrounding distress be changed? (p. 21)

(o) should the law respecting the priority of distress as against other creditors of the tenant be changed or codified? (p. 25)

(p) are any other changes to the law of distress in commercial tenancies necessary or advisable?

APPENDIX A

THE DISTRESS ACT, C.C.S.M. c. D90
and
REGULATION SETTING OUT PERMITTED COSTS

CHAPTER D90

THE DISTRESS ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Copy of demand at time of distress.

1 Every person who makes and levies a distress shall give to the person on whose goods and chattels the distress is levied a written demand signed by the person levying the distress demanding payment of the amount owing and in respect of which the distress is made and of all costs and charges of the distress, and there shall be printed on the demand or attached thereto a copy of the regulation prescribing the fees and charges that may be charged and collected in respect of the distress or an extract of the regulation indicating those fees and charges.

Costs of distress for rent.

2 No person making a distress for rent, and no person employed, in any manner, in making such a distress, or doing any act whatsoever in the course of the distress, or for carrying it into effect, shall have, take, or receive out of the proceeds of the goods and chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person, any other or more costs and charges, for and in respect of the distress or any matter or thing done therein, than those prescribed in the regulations and applicable to each proceeding that has been taken in the course of the distress: and no person shall make any charge whatsoever for any act, matter, or thing mentioned in this Act, or in the regulations, unless the act, matter, or thing has been really performed or done.

CHAPITRE D90

LOI SUR LA SAISIE-GAGERIE

SA MAJESTÉ, sur l'avis et du consentement de l'Assemblée législative du Manitoba, édicte :

Réclamation écrite donnée au saisi

1 Tout saisissant doit fournir, à la personne dont les biens personnels font l'objet de la saisie-gagerie, une réclamation écrite, signée par lui, réclamant le paiement de la somme due à l'égard de laquelle la saisie-gagerie est effectuée et de tous les droits et les frais de la saisie-gagerie. Une copie du règlement prescrivant les droits et les frais qui peuvent être exigés et recouvrés à l'égard de la saisie-gagerie ou un extrait du règlement indiquant ces frais doit être imprimé sur la demande ou y être joint.

Frais de saisie-gagerie pour non-paiement de loyer

2 Ni le saisissant en cas de saisie-gagerie pour non-paiement du loyer, ni une personne employée de quelque manière pour procéder à une telle saisie-gagerie, pour accomplir tout acte au cours de la saisie-gagerie ou pour la mettre à exécution, ne peut, à l'égard de la saisie-gagerie ou toute autre matière ou acte y afférent, prendre ou recevoir, du produit de la vente des biens personnels saisis, ou du locataire saisi, du locateur ou de toute autre personne, des droits et frais autres ou plus élevés que ceux prescrits dans les règlements et applicables à chaque procédure prise au cours de la saisie-gagerie. De plus, nul ne peut exiger des frais quelconques pour un acte ou une chose mentionné dans la présente loi ou dans les règlements, à moins que l'acte ou la chose n'ait été réellement accompli.

Costs of seizure under chattel mortgages, etc.

3 No person making a seizure under the authority of a chattel mortgage or bill of sale, or any other extra judicial process whatsoever, and no person employed in any manner in making such a seizure, or doing any act whatsoever in the course of the seizure, or for carrying it into effect, shall have, take, or receive out of the proceeds of the goods and chattels seized and sold, or from the person against whom the seizure is directed, or from any other person, any other or more costs and charges, for and in respect of the seizure or any matter or thing done therein or thereunder, than those prescribed in the regulations and applicable to each act that has been done in course of the seizure; and no person shall make any charge whatsoever for any act, matter, or thing mentioned in the regulations, unless the act, matter, or thing has been really performed or done.

Penalty for overcharging.

4 Where a person making a distress or seizure referred to in either section 2 or 3 takes or receives any other or greater costs than are prescribed in the regulations, or makes any charge whatsoever for any act, matter, or thing mentioned in the regulations and not really performed or done, the person aggrieved may cause the person making the distress or seizure to be summoned before a judge of the Court of Queen's Bench, and the judge may order the person making the distress or seizure to pay to the person aggrieved treble the amount of the moneys taken contrary to this Act and the costs of the summons; and in default of immediate payment of the moneys, together with costs, the judge may order execution to be issued against the goods and chattels of the person ordered to pay the moneys.

Agreement protected.

5 Nothing in this Act invalidates an express agreement entered into for the object of varying the fees prescribed in the regulations.

Presence of sheriff, etc., not necessary.

6 No sheriff, under-sheriff or constable need be present or assist at a distress or seizure.

Frais de saisie en vertu d'une hypothèque mobilière

3 Ni le saisissant en exécution d'une hypothèque mobilière ou d'un acte de vente, ou de tout autre acte de procédure extrajudiciaire, ni une personne employée de quelque manière pour procéder à une telle saisie, pour accomplir tout acte au cours de la saisie-gagerie ou pour la mettre à exécution, ne peut, à l'égard de la saisie-gagerie ou toute autre matière ou acte y afférent, prendre ou recevoir, du produit de la vente des biens personnels saisis, ou du saisi, ou de toute autre personne, des droits et frais autres ou plus élevés que ceux prescrits dans les règlements et applicables à chaque procédure prise au cours de la saisie-gagerie. De plus, nul ne peut exiger des frais quelconques pour un acte ou une chose mentionné dans la présente loi ou dans les règlements, à moins que l'acte ou la chose n'ait été réellement accompli.

Remboursement en cas de demande de frais excessifs

4 Lorsqu'une personne, procédant à une saisie-gagerie ou une saisie visée par l'article 2 ou 3, prend ou reçoit des frais autres ou plus élevés que ceux prescrits par règlement, ou exige des frais quelconques pour un acte ou une chose mentionné dans les règlements et qui n'a pas été accompli, la personne lésée peut faire assigner le saisissant devant un juge de la Cour du Banc de la Reine, et le juge peut ordonner au saisissant de payer à la personne lésée le triple du montant des sommes prises en contravention à la présente loi et les frais d'assignation. Le juge peut, en cas de défaut de paiement immédiat des sommes et frais susdits, ordonner la saisie-exécution des biens personnels de la personne ayant reçu l'ordre de payer.

Ententes valides

5 La présente loi n'a pas pour effet d'invalider une entente formelle ayant pour objet de modifier les frais prescrits par règlement.

Présence d'un shérif non nécessaire

6 La présence ou le concours d'un shérif, d'un sous-shérif ou d'un agent de police à une saisie ou saisie-gagerie n'est pas obligatoire.

Removal of goods for sale.

7(1) For the purpose of sale the goods and chattels distrained or seized for rent shall, at the request in writing of the tenant or owner of the goods and chattels, be removed to a public auction room, or to some other fit and proper place specified in the request, and be there sold.

Expenses of removal.

7(2) The costs and charges attending the removal and any damage to the goods and chattels arising therefrom shall be borne and paid for by the person requesting the removal.

Definition of "trader".

8(1) In this section "trader" means a retail merchant, a wholesale merchant, a commission merchant, a manufacturer, or a person who as his ostensible occupation buys and sells goods, wares, and merchandise, ordinarily the subject of trade and commerce, and, without restricting the generality of the foregoing, includes a person who carries on the trade or business of a hotel keeper, an inn keeper, or the keeper or operator of a victualling house, a restaurant, a cafe, or a refreshment house.

Landlord's priority limited to three months' rent.

8(2) Where a tenant, having any goods or chattels on which his landlord has distrained, or would be entitled to distrain, for rent, has made an assignment for the general benefit of creditors or has made an authorized assignment, or has had a receiving order made against him, under the Bankruptcy Act (Canada), the right of the landlord to distrain or realize his rent by distress ceases from the date of the assignment or receiving order; and the assignee or trustee under any such assignment or receiving order is entitled to immediate possession of the property of the tenant.

Transport des biens pour vente

7(1) Aux fins de la vente, les biens personnels saisis ou saisis pour non-paiement du loyer sont, sur demande écrite du locataire ou du propriétaire des biens personnels, transportés dans une salle d'enchères publiques ou dans un autre endroit approprié que spécifie la demande, afin d'y être vendus.

Frais de transport

7(2) Les frais relatifs au transport des biens personnels et aux dommages en résultant sont supportés et payés par la personne qui demande le transport.

Définition de "commerçant"

8(1) Aux fins du présent article, "commerçant" s'entend d'un détaillant, d'un grossiste, d'un commissionnaire, d'un fabricant, ou d'une personne dont la profession notoire consiste à acheter et vendre des objets, denrées et marchandises faisant habituellement l'objet du commerce et, notamment d'un hôtelier, d'un aubergiste, ou d'un tenancier ou exploitant de restaurant, de café ou de débit de boisson.

Cession ou mise en faillite

8(2) Lorsqu'un locataire, ayant des biens personnels sur lesquels le locateur a effectué une saisie-gagerie, ou serait en droit de le faire, pour non-paiement du loyer, a fait une cession au profit général de ses créanciers ou a fait une cession autorisée ou eu une mise en faillite effectuée contre lui, sous le régime de la Loi sur la faillite (Canada), le droit du locateur à la saisie-gagerie ou au recouvrement du loyer cesse à compter de la date de la cession ou de la mise en faillite; et le cessionnaire ou syndic dans le cadre d'une telle cession ou mise en faillite a le droit de prendre immédiatement possession des biens du locataire.

Priorities in distribution.

8(3) In the distribution of the property of the tenant, the assignee or trustee shall first pay all wages, salaries, commissions, or compensation of any clerk, servant, travelling salesman, labourer, or workman, in respect of services rendered to the tenant during three months before the date of the assignment or receiving order; and, after payment of such wages, salaries, commissions, or compensation, he shall pay to the landlord, in priority to all other debts, an amount not exceeding the value of the distrainable assets and not exceeding three months' rent accrued due prior to the date of the assignment or receiving order and the costs of distress, if any.

Landlord to rank as general creditor for balance.

8(4) In the case of such an assignment or receiving order, the landlord may prove as a general creditor for

(a) any arrears over three months' rent accrued due at the date of the assignment or receiving order; and

(b) any accelerated rent to which he may be entitled under his lease, not exceeding an amount equal to three months' rent.

Occupation rental payable by assignee or trustee.

8(5) Except as aforesaid, the landlord is not entitled to prove as a creditor for rent for any portion of the unexpired term of his lease; but the assignee or trustee shall pay to the landlord for the period during which he actually occupies the leased premises, from and after the date of the receiving order or assignment, a rental calculated on the basis of the lease.

Assignee may continue under lease after giving notice.

8(6) Notwithstanding any provision, stipulation, or agreement in any lease or agreement for a lease, in case of any such assignment or receiving order, the assignee or trustee may, within one month from the date of the assignment or receiving order, by notice in writing signed by him given to the landlord, elect to retain the premises occupied by the tenant at the time of the assignment or receiving order for the unexpired term of any lease under which the premises were held, or for such portion of the term as the assignee or trustee sees fit, upon the terms of the lease or agreement for a lease and subject to payment of the rent therefor at the rate provided by the lease or agreement for a lease.

Priorité dans la distribution des biens

8(3) Dans la distribution des biens du locataire, le cessionnaire ou le syndic paie en premier lieu tous les salaires, rémunérations, commissions ou compensations de tout commis, préposé, commis voyageur, ouvrier ou travailleur, à l'égard des services rendus au locataire dans les trois mois précédant la date de cession ou de mise en faillite; et il paie en second lieu au locateur, en priorité à toute autre dette, une somme n'excédant pas la valeur des biens saisissables et n'excédant pas la somme due pour au plus trois mois de loyer exigible avant la date de la cession ou de la mise en faillite, en plus des frais de saisie-gagerie, s'il y a lieu.

Locateur colloqué comme créancier ordinaire

8(4) Dans le cas d'une telle cession ou mise en faillite, le locataire peut être un créancier ordinaire pour :

a) les arriérés qui excèdent les trois mois de loyer exigible à la date de cession ou de mise en faillite;

b) un loyer anticipé auquel il a droit aux termes de son bail, et qui n'excède pas un montant équivalant à trois mois de loyer.

Paiement de loyer en cas d'occupation

8(5) À l'exception de ce qui précède, le locateur n'a pas le droit d'être colloqué comme créancier pour le loyer de la portion non expirée de son bail. Toutefois, le cessionnaire ou le syndic doit payer au locateur, pour la période durant laquelle il a occupé les lieux loués, à compter de la date de cession ou de mise en faillite, un prix de location calculé sur la base du bail.

Continuation du bail

8(6) Par dérogation à toute disposition, stipulation ou entente figurant dans un bail ou à toute entente de bail, en cas de cession ou de mise en faillite, le cessionnaire ou syndic peut, dans un délai d'un mois à compter de la date de la cession ou de la mise en faillite, par avis écrit signé par lui et remis au locateur, choisir de conserver les lieux occupés par le locataire au moment de la cession ou mise en faillite, pour la portion non expirée d'un bail en vertu duquel les lieux étaient occupés ou pour la portion non expirée que le cessionnaire ou syndic juge appropriée aux termes du bail ou de l'entente de bail et sous réserve du paiement du loyer au taux prévu au bail ou à l'entente de bail.

Temporary occupation by assignee after expiry of lease.

8(7) Where any such lease has terminated or expired at or before or after the date of any such assignment or receiving order, the assignee or trustee may retain possession of the leased premises for a period of 40 days from the date of the assignment or receiving order without notice to the landlord; and he may further, by giving notice in writing to the landlord at least 10 days prior to the expiration of the 40 days, retain possession of the leased premises for an additional period of 30 days, subject to payment of a rental calculated on the basis of the lease.

Application of section.

8(8) This section applies only to traders as defined in subsection (1).

Regulations.

9 The Lieutenant Governor in Council may make regulations prescribing costs and charges that may be charged and collected by a person making or levying a distress or seizure of goods and chattels.

Occupation temporaire après l'expiration du bail

8(7) Lorsqu'un tel bail est résilié ou a expiré avant ou après la date d'une telle cession ou mise en faillite, ou à cette même date, le cessionnaire ou syndic peut garder possession des lieux loués pour une période de 40 jours à compter de la cession ou mise en faillite, sans aviser le locateur: et il peut en garder possession pour une période additionnelle de 30 jours en donnant au locateur un avis écrit au moins 10 jours avant l'expiration de la période de 40 jours, sous réserve du paiement d'un prix de location calculé en conformité du bail.

Application de l'article

8(8) Le présent article s'applique uniquement aux commercants au sens du paragraphe (1).

Règlements

9 Le lieutenant-gouverneur en conseil peut prendre des règlements portant sur les frais et droits que peut exiger et recouvrer une personne faisant une saisie-gagerie ou une saisie de biens personnels.

The Queen's Printer
for the Province of Manitoba

L'Imprimeur de
la Reine du Manitoba

THE DISTRESS ACT
(C.C.S.M. c. D90)

Distress Charges Regulation

Regulation 316/87 R
Filed August 31, 1987

1 The costs and charges set out in the Schedule are prescribed as the costs and charges on a distress or seizure.

SCHEDULE

1 Levying distress or effecting seizure of goods and chattels (including receiving, entering and return, perusal of documents, possession fees, warrant to bailiff and bond from creditor):
(a) where the claim is $100. or less: $5.;
(b) where the claim exceeds $100.: $5. plus $1. for each succeeding $100. or fraction thereof up to a combined maximum of $20.

2(1) Possession charges per day per person where real or actual possession is necessary: $10.

2(2) Possession charges are not to be charged in the case of constructive possession or where goods and chattels are put in storage.

3 Bond in lieu of possession: $5.

4 For appraisal, whether by one appraiser or more, where it is necessary for the purposes of sale: 2% of the value of the goods (minimum $5.).

5 All reasonable and necessary disbursements for advertising.

6 Catalogue, sale, commission and delivery of goods:
(a) 10% on the first $500. of the net proceeds of the sale;
(b) 5% on the next $1,000. or fraction thereof; and
(c) 3% on the remainder.

7 Travel expenses where seizure effected or distress levied: 40¢/km (one way).

8 All necessary and reasonable disbursements for removing and storing goods and removing and keeping livestock, and all other disbursements that, in the opinion of a judge or court officer of the Court of Queen's Bench before whom any question as to the amount of the fees to be allowed under this Act may come for decision, are reasonable and necessary.

LOI SUR LA SAISIE-GAGERIE
(C.P.L.M., c. D90)

Règlement prescrivant les frais afférents à une saisie-gagerie

Règlement 316/87 R
Date de dépôt : le 31 août 1987

1 Les droits et les frais indiqués dans l'annexe sont ceux prescrits dans le cadre d'une saisie-gagerie ou d'une saisie.

ANNEXE

1 Saisie-gagerie ou saisie de biens personnels (y compris la réception, l'inscription et le rapport, l'examen des documents, les frais de possession, le mandat du huissier et le cautionnement du créancier) :
a) dans les cas où la réclamation s'élève à 100 $ ou moins : 5 $;
b) dans les cas où la réclamation est supérieure à 100 $: 5 $, plus 1 $ pour chaque tranche supplémentaire de 100 $ ou fraction de cette somme, jusqu'à concurrence d'une somme maximale de 20 $.

2(1) Frais de possession quotidiens par personne, dans les cas où la possession effective est nécessaire : 10 $.

2(2) Les frais de possession ne s'appliquent pas dans les cas de possession de droit ou lorsque les biens personnels sont entreposés.

3 Cautionnement à la place de la possession : 5 $.

4 Pour l'évaluation, qu'elle soit effectuée par un ou plusieurs évaluateurs, dans les cas où cette évaluation est nécessaire aux fins de la vente : 2 % de la valeur des biens (minimum : 5 $).

5 Tous les débours raisonnables et nécessaires aux fins de la publicité.

6 Catalogue, vente, commission et livraison des biens :
a) 10 % de la première tranche de 500 $ du produit net de la vente;
b) 5 % de la tranche suivante de 1 000 $ ou de la fraction de celle-ci;
c) 3 % de l'excédent.

7 Frais de déplacement dans les cas de saisie ou de saisie-gagerie : 0,40 $/km-aller ou retour seulement.

8 Tous les débours raisonnables et nécessaires relativement au transport et à l'entreposage des biens et au transport et à la garde du bétail, aussi que tous les autres débours qui, de l'avis d'un juge ou d'un auxiliaire de la justice de la Cour du Banc de la Reine saisi d'une question portant sur le montant des frais devant être accordés en vertu de ladite loi, sont raisonnables et nécessaires.

APPENDIX B

RELEVANT EXTRACTS FROM *THE LANDLORD AND TENANT ACT*, C.C.S.M. c. L70

CHAPTER L70

THE LANDLORD AND TENANT ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions.

1 In this Act,

"crops" means the products of the soil and without limiting the generality of the foregoing includes all sorts of grain, grass, hay, hops, fruits, pulse, and other products of the soil; ("récoltes")

"landlord" includes the owner, or other person permitting occupancy of a rental unit, and his heirs, assigns, personal representatives and successors in title and a person, other than a tenant occupying the rental unit, who is entitled to possession of the rental unit and who attempts to enforce any of the rights of a landlord under a tenancy agreement under this Act, including the right to collect rent; ("locateur")

"minister" means a member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act; ("ministre")

"residential premises" means premises used for residential purposes, including parking accommodations or mobile homes, or both, situated in a permanent mobile home park, but it does not include premises occupied for business purposes with living accommodation attached under a single lease or any premise

CHAPITRE L70

LOI SUR LE LOUAGE D'IMMEUBLES

SA MAJESTÉ, sur l'avis et du consentement de l'Assemblée législative du Manitoba, édicte :

Définitions

1 Les définitions qui suivent s'appliquent à la présente loi.

"convention de location" Convention écrite, verbale ou tacite entre le propriétaire et le locataire, portant sur la possession de locaux d'habitation. ("tenancy agreement")

"dépôt de garantie" Somme d'argent en espèces ou sous forme de chèque que le locataire d'un local d'habitation verse ou donne au propriétaire ou à son mandataire ou à quiconque pour son compte afin qu'elle soit détenue par le propriétaire ou pour le compte de celui-ci à titre de garantie pour le paiement des arriérés de loyer ou des dommages causés aux locaux. ("security deposit")

"locataire" S'entend également du preneur à bail, de l'occupant, du sous-locataire, de ses ou de leurs ayants droit et représentants légaux. ("tenant")

"local d'habitation" Local servant d'habitation, y compris les aires de stationnement ou les maisons mobiles, ou les deux, situées dans un parc permanent de maisons mobiles, à l'exclusion des locaux à usage commercial dans lesquels il existe un logement et qui sont couverts par un même bail ou des locaux situés sur un bien-fonds de plus de trois acres,

situated on more than three acres of land unless under the tenancy agreement the tenant is restricted to the use of not more than three acres of land together with the premise; ("local d'habitation")

"security deposit" means money in the form of cash or cheque paid or given by a tenant of residential premises to a landlord or his agent or to anyone on his behalf to be held by or for the account of the landlord as security for the payment of rent in arrears or for damage to the premises; ("dépôt de garantie")

"standing crops" means crops standing or growing on the demised premises; ("récoltes sur pied")

"tenancy agreement" means an agreement between a landlord and a tenant for possession of residential premises, whether written, oral or implied; ("convention de location")

"tenant" includes lessee, occupant, sub-tenant, under-tenant, and his or their assigns and legal representatives. ("locataire")

Method for service or giving notice, etc.

2(1) Where, under this Act, a notice, demand, process or other document is required to be served on or given to a person, it may be served on or given to the person

(a) by personal service on the person; or

(b) by leaving it personally with an adult on the premises at the latest address of the person known to the person required to give or serve it; or

(c) except in the case of service required under section 67, 73, 100 or 104, by mailing it by registered mail addressed to the person at the latest address of the person known to the person required to give or serve it.

Substitutional service.

2(2) Where a person required under this Act to serve or give a notice, demand, process or other document on or to another person is unable to serve or give it in accordance with clause (1)(a) or (b),

sauf si aux termes de la convention de location, le locataire est restreint à l'usage d'au plus trois acres de bien-fonds conjointement avec le local. ("residential premises")

"locateur" S'entend également du locateur ou d'une autre personne qui autorise l'occupation d'un logement locatif, et de ses héritiers, ayants droit, exécuteurs testamentaires et successeurs en titre, ainsi que de la personne, autre que le locataire occupant le logement locatif, qui a un droit de possession sur ce logement locatif et qui tente de faire exécuter l'un quelconque des droits que le locateur tient de la convention de location en conformité avec la présente loi, y compris le droit de percevoir le loyer. ("landlord")

"ministre" Le membre du Conseil exécutif chargé par le lieutenant-gouverneur en conseil de l'application de la présente loi. ("minister")

"récoltes" Les produits du sol, y compris notamment toutes sortes de céréales, herbages, fourrages, houblons, fruits, légumineuses et autres produits du sol. ("crops")

"récoltes sur pied" Récoltes qui sont sur pied ou qui poussent sur les lieux loués. ("standing crops")

Mode de signification ou de remise d'un avis

2(1) Dans le cas où, en application de la présente loi, un avis, une mise en demeure, un acte de procédure ou autre document doit être signifié ou remis à une personne, la signification ou la remise peut se faire, selon le cas :

a) à personne;

b) en le remettant à un adulte se trouvant au local à la dernière adresse de cette personne, telle que la connaît la personne tenue à la remise ou à la signification;

c) à l'exception des cas où la signification est prescrite par les articles 67, 73, 100 ou 104, par courrier recommandé envoyé à la dernière adresse de cette personne, telle que la connaît la personne tenue à la remise ou la signification.

Signification indirecte

2(2) Dans le cas où la personne tenue de signifier ou de remettre un avis, une mise en demeure, un acte de procédure ou autre document à un destinataire n'est pas en mesure de le

and is unaware or uncertain of any recent address of the other person, the person required to serve or give the notice, demand, process or other document may apply to a judge of the Court of Queen's Bench for an order for substitutional service and the judge may, if he is satisfied that every reasonable effort has been made to serve or give the notice, demand, process or other document on or to the other person, grant an order for such substitutional service on the other person as he deems reasonable.

signifier ou de le remettre conformément à l'alinéa (1)a) ou b) parce qu'elle ne connaît pas l'adresse récente du destinataire ou n'en est pas certaine, elle peut demander à un juge de la Cour du Banc de la Reine de rendre une ordonnance autorisant la signification indirecte. Si le juge est convaincu que cette personne a fait raisonnablement diligence pour signifier l'avis, la mise en demeure, l'acte de procédure ou autre document au destinataire, il peut rendre l'ordonnance autorisant la signification indirecte au destinataire, de la manière qu'il juge raisonnable.

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Right of re-entry for non-payment of rent.

17(1) In every demise, whether by parol or in writing and whenever made, unless it is otherwise agreed or provided by statute, there shall be deemed to be included an agreement that if the rent reserved, or any part thereof, remains unpaid for 15 days after any of the days on which it ought to have been paid, although no formal demand thereof has been made, it shall be lawful for the landlord at any time thereafter, into and upon the demised premises, or any part thereof in the name of the whole, to re-enter and the same to have again, repossess and enjoy as of his former estate.

Droit de reprise de possession pour non-paiement du loyer

17(1) Dans toute cession à bail verbale ou écrite, quel que soit le moment où elle a été conclue et sauf convention contraire ou disposition contraire d'une loi, il est réputé être entendu que si un loyer réservé, ou toute partie de celui-ci, demeure impayé dans les 15 jours de la date à laquelle il aurait dû être payé, même si aucune mise en demeure formelle n'a été faite, le locateur peut, en tout temps après ce délai, reprendre légalement possession des lieux loués ou de toute partie de ceux-ci au nom de l'ensemble, et les avoir et posséder à nouveau et en jouir comme de son droit antérieur.

Right of re-entry where bawdy house kept.

17(2) In every such demise as aforesaid, if the tenant or any other person is convicted of keeping a disorderly house within the meaning of the Criminal Code (Canada), on the demised premises, or any part thereof, the landlord may at any time thereafter, into the demised premises, or any part thereof, re-enter and the same have again, repossess and enjoy as of his former estate.

Reprise de possession dans le cas d'une maison de désordre

17(2) Dans toute cession à bail telle que susmentionnée, si le locataire ou une autre personne est déclaré coupable de tenir une maison de désordre au sens du Code criminel (Canada), dans les lieux loués ou une partie de ceux-ci, le locateur peut, en tout temps par la suite, reprendre possession des lieux ou de toute partie de ceux-ci et les avoir et posséder à nouveau et en jouir comme de son droit antérieur.

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Distress for three month's arrears.

29(1) No person may distrain as against the tenant or any other person for more than the next preceding three month's arrears of rent where the rent is payable quarterly or more frequently, nor for more than the next preceding one year's arrears where the rent is payable less frequently than quarterly.

Saisie-gagerie pour trois mois d'arriérés de loyer échus

29(1) Il est interdit d'effectuer contre le locataire ou une autre personne une saisie-gagerie supérieure à trois mois d'arriérés de loyer immédiatement antérieurs lorsque le loyer est payable par trimestre ou plus fréquemment, ou supérieure à une année d'arriérés de loyer immédiatement antérieurs lorsque le loyer est payable moins fréquemment que par trimestre.

Distress reasonable.
29(2) Distress shall be reasonable.

Distress for rents seck.
29(3) Every person may have the like remedy by distress, and by impounding and selling the property distrained in a case of rent-seck, as in case of rent reserved upon lease.

Distress on determination.
30 A person having any rent due and in arrear, upon any lease for life or lives or for years, or at will, ended or determined, may distrain for the arrears, after the determination of the lease, in the same manner as he might have done if the lease had not been ended or determined, if the distress is made during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due.

Distress in case of death.
31 A person entitled to any rent or land for the life of another may recover by action or distress the rent due and owing at the time of the death of the person whose life the rent or land depended as he might have done if the person by whose death the estate in the rent or land determined had continued in life.

Personal representative may distrain.
32 The executors or administrators of a landlord may distrain for the arrears of rent due to the landlord in his lifetime and may sue for the arrears in like manner as the landlord might have done if living; and the powers and provisions contained in this Act relating to distresses for rent are applicable to the distresses so made.

Saisie-gagerie raisonnable
29(2) La saisie-gagerie doit être raisonnable.

Saigie-gagerie en cas de rentes simples
29(3) Quiconque peut avoir droit, en cas de rente simple, au même recours par voie de saisie-gagerie, de garde et de vente du bien saisi que dans le cas d'un loyer fixé dans un bail.

Saisie-gagerie à l'extinction du bail
30 À la fin ou à l'extinction d'un bail pour la durée de la vie d'une ou de plusieurs personnes, pour une durée déterminée ou à titre congéable, une personne ayant droit au loyer échu et en retard peut effectuer une saisie-gagerie des arriérés de la même manière qu'elle aurait pu le faire si le bail n'avait pas pris fin ou n'était pas éteint, à condition que la saisie-gagerie soit effectuée pendant que le titre de propriété ou le droit du locateur se poursuit et pendant que se poursuit la possession du locataire débiteur des arriérés échus.

Saisie-gagerie en cas de décès
31 La personne ayant droit à un loyer ou à un bien-fonds pendant la durée de la vie d'une autre personne peut, par voie d'action ou de saisie-gagerie, recouvrer le loyer dû et exigible à la date du décès de la personne dont la vie conditionne ce loyer ou ce bien-fonds comme elle aurait pu le faire si la personne dont le décès a provoqué l'extinction du droit sur ce loyer ou bien-fonds était demeurée en vie.

Saisie-gagerie par les représentant personnels
32 Les exécuteurs testamentaires ou les administrateurs d'un locateur peuvent effectuer une saisie-gagerie au titre des arriérés de loyer dus au locateur pendant qu'il était vivant et peuvent intenter une action pour recouvrer les arriérés de la même manière que le locateur aurait pu le faire s'il était vivant. Les pouvoirs et les dispositions contenus dans la présente loi relativement aux saisies-gageries en cas de non-paiement du loyer s'appliquent aux saisies-gageries ainsi effectuées.

PROPERTY LIABLE TO DISTRESS

Right to distrain grain, etc.

33 A person having rent due and in arrear upon any demise, lease, or contract may seize and secure any sheaves or cocks of grain, or grain loose, or in the straw, or hay, lying or being in any barn or granary or otherwise upon any part of the land charged with the rent, and may lock up or detain the same, in the place where the same is found, for or in the nature of a distress until the same is replevied, and, in default of the same being replevied, may remove and sell the same.

Right to distrain cattle, etc.

34(1) A landlord may take and seize, as a distress for arrears of rent, any cattle or livestock of his tenant feeding or pasturing upon any highway, or on any way belonging to the demised premises or any part thereof.

Right to distrain standing crops.

34(2) Subject to subsection (4), a landlord may take and seize standing crops as a distress for arrears of rent, and may cut, gather, make, cure, carry, lay up and thresh the same, when ripe, in the barns or other proper place on the demised premises, and if there is none on the demised premises then in another barn or proper place which the landlord hires or otherwise procures for that purpose as near as may be to the premises, and may in convenient time appraise, sell or otherwise dispose of the same towards satisfaction for the rent for which the distress is made, and of the charges of the distress, appraisement and sale in the same manner as other goods and chattels may be seized, distrained and disposed of, and the appraisement thereof shall be taken when cut, gathered, threshed, cured, and made and not before.

BIENS SUSCEPTIBLES DE SAISIE-GAGERIE

Droit d'effectuer une saisie-gagerie des céréales

33 La personne ayant droit au loyer dû et en retard aux termes d'une cession à bail, d'un bail ou d'un contrat peut saisir et gager les gerbes ou meules de céréales ou céréales battues ou sur tige, ou le foin se trouvant dans une grange, un grenier ou un autre endroit du bien-fonds grevé par ce loyer. Elle peut les mettre sous clef ou les garder au même endroit où ils ont été trouvés, au titre d'une saisie-gagerie ou tout comme dans une saisie-gagerie jusqu'à ce qu'ils soient revendiqués; s'ils ne sont pas revendiqués, elle peut les enlever et les vendre.

Droit d'effectuer la saisie-gagerie du bétail

34(1) Le locateur peut prendre et saisir, au titre d'une saisie-gagerie pour arriérés de loyer, le bétail ou le cheptel de son locataire se nourrissant ou pâturant sur une route ou sur une voie faisant partie des lieux loués ou d'une partie de ceux-ci.

Droit d'effectuer la saisie-gagerie des récoltes sur pied

34(2) Sous réserve du paragraphe (4), le locateur peut prendre et saisir des récoltes sur pied au titre d'une saisie-gagerie pour arriérés de loyer. Il peut les couper, ramasser, faire, sécher, transporter, stocker et battre lorsqu'elles arrivent à maturité dans les granges ou en d'autres endroits appropriés situés sur les lieux loués et, s'il n'y en a pas sur les lieux loués, dans une autre grange ou en un autre endroit approprié que le locateur loue ou obtient de toute autre façon à cet effet aussi près que possible des lieux. Il peut, au moment opportun, les évaluer, les vendre ou les aliéner de toute autre façon en vue d'obtenir règlement du loyer impayé qui a donné lieu à la saisie-gagerie ainsi que des frais de saisie-gagerie, d'évaluation et de vente de la même manière qu'il est possible de saisir et d'aliéner d'autres biens personnels. L'évaluation de ces récoltes doit avoir lieu une fois qu'elles sont coupées, ramassées, battues, séchées et faites et non auparavant.

Notice of to tenant.
34(3) Notice of the place where the goods and chattels so distrained are lodged or deposited, shall, within one week after the lodging or depositing thereof, be given to the tenant or left at his last place of abode.

Satisfying such distress.
34(4) If, after a distress of standing crops so taken for arrears of rent, and at any time before the same are ripe and cut, cured or gathered, the tenant pays to the landlord for whom the distress is taken the whole rent then in arrear, with the full costs and charges of making the distress and occasioned thereby, then, upon the payment or lawful tender thereof the same and every part thereof shall cease, and the standing crops so distrained shall be delivered up to the tenant.

Sale of crops.
34(5) Where standing crops are distrained for rent they may, at the option of the landlord, be advertised and sold in the same manner as other goods; and it shall not be necessary for the landlord to reap, thresh, gather or otherwise market the same.

Liability of purchaser for occupation.
34(6) Any person purchasing standing crops at the sale shall be liable for the rent of the land upon which the same are standing at the time of the sale, from that time until the same are removed, unless the rent has been paid or has been collected, by the landlord, or has been otherwise satisfied, and the rent shall as nearly as may be, be the same as that which the tenant whose goods were sold was to pay, having regard to the quantity of land, and to the time during which the purchaser occupies it.

Chattels off premises not to be distrained.
35 Save as herein otherwise provided, goods or chattels that are not at the time of the distress upon the premises in respect of which the rent distrained for is due shall not be distrained for rent.

Avis de l'endroit donné au locataire
34(3) Un avis de l'endroit où sont placés ou déposés les biens personnels saisis doit être donné au locataire ou laissé à son dernier lieu de résidence dans la semaine qui suit leur placement ou dépôt.

Règlement de la saisie-gagerie
34(4) Si, après que la saisie de récoltes sur pied a ainsi été effectuée pour des arriérés de loyer et à tout moment avant qu'elles arrivent à maturité et soient coupées, séchées ou ramassées, le locataire paie au locateur pour lequel la saisie-gagerie est effectuée la totalité des arriérés de loyer ainsi que tous les frais que la saisie-gagerie a entraînés, la saisie-gagerie prend fin sur paiement ou offre régulière de paiement de tous ces arriérés de loyer, et les récoltes sur pied ainsi saisies doivent être restituées au locataire.

Vente des récoltes sur pied
34(5) Lorsque les récoltes sur pied font l'objet d'une saisie-gagerie pour des arriérés de loyer, elles peuvent, au choix du locateur, être annoncées et vendues de la même manière que d'autres objets, et le locateur n'est pas tenu de les moissonner, battre, ramasser ou les commercialiser d'une autre façon.

Responsabilité de l'acheteur
34(6) Quiconque achète des récoltes sur pied lors de la vente est redevable du loyer du bien-fonds sur lequel les récoltes sont sur pied à la date de la vente, à partir de cette date jusqu'à ce que les récoltes soient enlevées, à moins que le loyer n'ait été payé ou perçu par le locateur ou réglé de toute autre façon, et ce loyer doit être, autant que possible, identique à celui que le locataire dont les biens ont été vendus devait payer, compte tenu de la surface du bien-fonds et du temps pendant lequel l'acheteur l'occupe.

Insaisissabilité des biens personnels hors les lieux loués
35 Sauf disposition contraire de la présente loi, les objets ou les biens personnels qui, à la date de la saisie-gagerie, ne sont pas sur les lieux relativement auxquels le loyer faisant l'objet de la saisie-gagerie est dû sont insaisissables en cas de non-paiement du loyer.

Exemptions from seizure.

36(1) The following chattels are exempt from seizure under any landlord's warrant of distress, namely:

(a) the beds, bedding and bedsteads (including perambulators or cradles) in ordinary use by the debtor and his family;

(b) the necessary and ordinary wearing apparel of the debtor and his family;

(c) one cooking stove with pipes and furnishings, one other heating stove with pipes, two towels, one washbasin, one kitchen table, one tea kettle, one teapot, one saucepan, one frying pan, and for each member of the family the following, namely: one chair, one cup and saucer, one plate, one knife, one fork and one spoon;

(d) all necessary fuel, meat, fish, flour and vegetables for the ordinary consumption of the debtor and his family for 30 days;

(e) the tools, agricultural implements and necessaries used by the debtor in the practice of his trade, profession or occupation, to the value of $600.; and

(f) 50 volumes of books, the books of a professional man, one axe, one saw.

Biens personnels insaisissables

36(1) Le locateur ne peut saisir au moyen d'un bref de saisie-gagerie les biens personnels suivants :

a) les lits, la literie et les châlits (y compris les voitures d'enfants et les berceaux) d'utilité courante par le débiteur et sa famille;

b) les vêtements ordinaires et nécessaires pour le débiteur et sa famille;

c) une cuisinière avec les tuyaux et l'approvisionnement, un poêle de chauffage avec les tuyaux, deux serviettes, un lavabo, une table de cuisine, une bouilloire, une théière, une casserole, une poêle à frire, et pour chaque membre de la famille, les biens personnels suivants : une chaise, une tasse et une soucoupe, une assiette, un couteau, une fourchette et une cuillère;

d) le combustible, la viande, le poisson, la farine et les légumes nécessaires pour la consommation ordinaire du débiteur et de sa famille pendant 30 jours;

e) les outils, les instruments aratoires et les fournitures nécessaires dont le débiteur se sert dans l'exercice de son métier, de sa profession ou de son emploi jusqu'à concurrence d'une valeur de 600 $;

f) 50 livres, les livres d'un professionnel, une hache, une scie.

Selections of exemptions.

36(2) The person claiming the exemption shall select and point out the goods and chattels which he claims to be exempt.

Choix des biens personnels insaisissables

36(2) La personne qui revendique l'insaisissabilité doit choisir et désigner les biens personnels qu'elle veut soustraire à la saisie.

Exemptions cannot be waived in leases, etc.

36(3) Every agreement in any oral or written lease to waive or abandon an exemption from seizure or a benefit, right or privilege of exemption from seizure under this Act and every arrangement, contract or bargain, oral or written, under seal or otherwise, collateral to a lease and any chattel mortgage as security for a lease, made or entered into, with or without valuable consideration, whereby an attempt is made to prevent any person from claiming any benefit, right or privilege of exemption under this Act, is void.

Renonciation à la condition d'insaisissabilité dans un bail

36(3) Est nulle la convention contenue dans un bail verbal ou écrit visant à renoncer à une condition d'insaisissabilité ou au bénéfice, droit ou privilège d'insaisissabilité prévu à la présente loi ou à les abandonner. En outre, sont nuls les ententes, les contrats ou les marchés verbaux ou écrits revêtus du sceau ou autrement, accessoires à un bail, ainsi que l'hypothèque sur biens personnels garantissant un bail, conclus ou passés, avec ou sans contrepartie valable, par lesquels on tente d'empêcher une personne de revendiquer un bénéfice, un droit ou un privilège d'insaisissabilité prévu à la présente loi.

Right to distrain limited to goods of tenant.

37 A landlord shall not distrain for rent on goods and chattels the property of any person except the tenant or person who is liable for the rent, although they are found on the premises: but this restriction does not apply,

(a) to crops or grain in favour of a person claiming title under or by virtue of an execution or attachment against the tenant; or

(b) in favour of any person whose title is derived by purchase, gift, transfer or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise; or

(c) to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase or by which he may or is to become the owner thereof upon performance of any condition; or

(d) where goods have been exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of, or the right of distress by, the landlord; or

(e) where the property is claimed by the wife, husband, daughter, son, daughter-in-law or son-in-law of the tenant, or by any other relative of his in case the other relative lives on the premises as a member of the tenant's family; or

(f) in favour of any person whose title is derived by purchase, gift, transfer or assignment, whether absolute or in trust, or by way of mortgage or otherwise, from the wife, husband, daughter, son, daughter-in-law or son-in-law of the tenant, or from any other relative of his in case the other relative lives on the premises as a member of the tenant's family.

Droit d'effectuer une saisie-gagerie limité aux objets du locataire

37 Le locateur ne peut effectuer une saisie-gagerie pour loyer de biens personnels appartenant à une personne autre que le locataire ou la personne qui est redevable du loyer, même s'ils sont trouvés sur les lieux. Cette restriction ne s'applique pas, selon le cas :

a) aux récoltes ou aux céréales à l'avantage d'une personne qui en revendique le titre de propriété aux termes ou en vertu d'un bref d'exécution ou de saisie décerné contre le locataire:

b) à l'avantage d'une personne titulaire d'un titre de propriété en vertu d'un achat, d'une donation, d'un transfert ou d'une cession de la part du locataire, que ce soit à titre absolu ou en fiducie, ou par voie d'hypothèque ou par tout autre moyen:

c) aux droits que possède le locataire sur tout objet sur les lieux aux termes d'un contrat d'achat ou aux termes duquel le locataire peut en devenir le locateur ou en devient le locateur en cas de réalisation de quelque condition;

d) lorsque des objets ont été échangés entre deux locataires ou deux personnes, objets que l'un d'eux a empruntés ou loués à l'autre afin de faire échec à la demande ou au droit de saisie-gagerie du locateur;

e) lorsque la propriété est revendiquée par le conjoint, la fille, le fils, la belle-fille ou le beau-fils du locataire ou par un autre parent du locataire qui vit sur les lieux comme membre de la famille du locataire;

f) à l'avantage d'une personne titulaire d'un titre de propriété en vertu d'un achat, d'une donation, d'un transfert ou d'une cession, que ce soit à titre absolu ou en fiducie, ou par voie d'hypothèque ou par tout autre moyen, conclu avec le conjoint, la fille, le fils, la belle-fille ou le beau-fils du locataire ou d'un autre parent qui vit sur les lieux à titre de membre de la famille du locataire.

Mortgagee or vendor not to distrain goods of tenant exempt from execution.

38(1) The right of a mortgagee of land or of a vendor of land, with or without chattels, under an agreement of sale, or the assigns of either, to distrain under this Act or otherwise for an amount payable under the mortgage or agreement of sale,

Insaisissabilité par les créanciers hypothécaires ou les vendeurs

38(1) Le droit du créancier hypothécaire ou du vendeur d'un bien-fonds, avec ou sans biens personnels, aux termes d'une convention de vente, ou de leurs ayants droit, d'effectuer une saisie-gagerie en application de la présente loi ou d'une

is notwithstanding anything to the contrary in the mortgage or agreement of sale or in any other agreement relating thereto, limited (except as in this section otherwise provided) to the goods and chattels of the mortgagor or purchaser, and is also limited to such goods and chattels as are not exempt from seizure under execution; but no grain shall be exempt by reason of being grown on exempt land.

autre façon pour un montant exigible aux termes de l'hypothèque ou de la convention de vente est limité, malgré une disposition contraire dans l'hypothèque, la convention de vente ou dans une autre convention y relative (à l'exception d'une disposition contraire dans le présent article), aux objets et biens personnels du débiteur hypothécaire ou de l'acheteur. En outre, il est limité aux objets et biens personnels qui ne sont pas insaisissables aux termes d'un bref d'exécution. Cependant, les céréales ne sont pas insaisissables du fait qu'elles ont poussé sur un bien-fonds insaisissable.

Mortgagee or vendor may serve notice and recover rent or rental value.

38(2) In addition to, or concurrently with, the exercise of any other remedy a mortgagee or vendor by a notice in writing served upon the tenant or other person occupying the land may require the tenant or occupant to pay him, in the case of a tenant, the rent, or in the case of an occupant not a tenant, the rental value of the land or so much thereof in either case as has not already been paid and to continue to pay it from time to time as it falls due to the extent, and to be applied on account, of

(a) the interest due, and all taxes or levies and premiums of insurance payable by the mortgagor or purchaser under the mortgage or agreement of sale: and

(b) all moneys which the mortgagee or vendor has paid upon or in respect of a prior mortgage or charge upon the land and for the payment of which the mortgagor or purchaser is liable;

and subject to the exemptions from seizure provided in this section, the rent or rental value may be recovered by the mortgagee or vendor serving the notice, from the tenant or occupant, in the same manner, and with the same rights, as if the relation of landlord and tenant existed between the mortgagee or vendor and the tenant or occupant.

Signification d'avis

38(2) En plus de l'exercice d'un autre recours ou simultanément avec l'exercice d'un autre recours, le créancier hypothécaire ou le vendeur peut, au moyen d'un avis par écrit signifié au locataire ou autre occupant du bien-fonds, exiger que le locataire ou l'occupant lui verse le loyer, dans le cas du locataire, ou la valeur locative du bien-fonds, dans le cas de l'occupant qui n'est pas locataire, ou la partie du loyer ou de la valeur locative qui n'a pas encore été versée, et qu'il continue à le verser périodiquement à son échéance jusqu'à concurrence des montants suivants et à les imputer à compte :

a) de l'intérêt dû et de tous les impôts et taxes ou prélèvements et des primes d'assurance payables par le débiteur hypothécaire ou l'acheteur aux termes de l'hypothèque ou de la convention de vente;

b) de toutes les sommes d'argent versées par le créancier hypothécaire ou le vendeur au titre d'une hypothèque ou d'une charge antérieures sur le bien-fonds ou relativement à celles-ci et pour le paiement desquelles le créancier hypothécaire ou l'acheteur est redevable.

Sous réserve des conditions d'insaisissabilité prévues au présent article, le créancier hypothécaire ou le vendeur qui signifie l'avis peut recouvrer le loyer ou la valeur locative du locataire ou de l'occupant, de la même manière et avec les mêmes droits que si la relation liant le locateur au locataire existait entre le créancier hypothécaire ou le vendeur et le locataire ou l'occupant.

Consent of prior mortgagees.

38(3) A mortgagee or vendor may exercise the rights conferred by subsection (2) only with the previous consent in writing of all prior mortgagees and vendors or in the absence of that consent only while no such prior mortgagee or vendor is exercising his rights to recover the rent or rental value.

Determination and settlement of disputes as to rental value.

38(4) The amount and periods for payment of the rental value claimed by such a mortgagee or vendor and the time of payment thereof shall be specified in the notice served on the occupant, and the amount shall be the fair rental value of the premises, and the periods for payment, in default of an agreement to the contrary in pursuance of which the occupant has possession of the premises, shall be in accordance with the usual practice relating to premises of a similar nature: and in case the occupant disputes the amount claimed or the period for, or time of, payment thereof, he may apply, and whether disputed or not the mortgagee or vendor may apply, to a judge of the Court of Queen's Bench under Part II, and that Part shall apply, with such modifications as the circumstances require, to the settlement of disputes or to the determination of any question relating to rental value between mortgagees or vendors and occupants of land.

Mortgagee accountable for receipts.

38(5) No mortgagee or vendor shall, when acting under this section, be held accountable for any rent or money claimed as rental value not actually received by him, but all moneys received by him shall be pro tanto satisfaction of the rent or other sums owing by the tenant or occupant.

Consentement des créanciers hypothécaires antérieurs

38(3) Le créancier hypothécaire ou le vendeur peuvent exercer les droits que confère le paragraphe (2) uniquement avec le consentement préalable par écrit de tous les créanciers hypothécaires et vendeurs de rang supérieur ou, en l'absence d'un tel consentement, uniquement lorsque ce créancier hypothécaire ou ce vendeur de rang supérieur n'exerce pas ses droits pour recouvrer le loyer ou la valeur locative.

Règlement des litiges relatifs à la valeur locative

38(4) Le montant et les périodes de paiement de la valeur locative revendiquée par ce créancier hypothécaire ou ce vendeur ainsi que la date de paiement de la valeur locative doivent être précisés dans l'avis signifié à l'occupant. Le montant doit équivaloir à la juste valeur locative des lieux et les périodes de paiement, en l'absence d'une convention contraire conformément à laquelle l'occupant est en possession des lieux, doivent être conformes à l'usage ordinaire pour des lieux d'une nature semblable. L'occupant qui conteste le montant, la période ou la date de paiement de la valeur locative, de même que le créancier hypothécaire ou le vendeur, qu'il y ait contestation ou non, peuvent présenter une demande à un juge de la Cour du Banc de la Reine en conformité avec la partie II, et cette partie s'applique, compte tenu des adaptations de circonstance, au règlement des litiges ou à la décision d'une question en litige entre les créanciers hypothécaires ou les vendeurs et les occupants du bien-fonds relativement à la valeur locative.

Reddition de compte par le créancier hypothécaire

38(5) Nul créancier hypothécaire ou vendeur n'est tenu de rendre compte du loyer ou de la somme d'argent revendiquée à titre de valeur locative qu'il n'a pas effectivement reçue lorsqu'il agit en conformité avec le présent article. Cependant, les sommes d'argent qu'il reçoit doivent servir à acquitter proportionnellement le loyer ou les sommes dus par le locataire ou l'occupant.

Application of section.
38(6) This section applies to the personal representatives, successors and assigns of a mortgagee or vendor, and applies in the case of any mortgage or agreement of sale whenever made; but nothing in this section affects any pending litigation.

Application du présent article
38(6) Le présent article s'applique aux représentants personnels, aux successeurs et ayants droit du créancier hypothécaire ou du vendeur et il s'applique à une hypothèque ou à une convention de vente conclue à quelque moment que ce soit. Cependant, le présent article ne porte pas atteinte à une affaire en instance.

TENANT'S RIGHT OF SET-OFF

DROIT DE COMPENSATION DU LOCATAIRE

Right of set-off.
39(1) A tenant may set-off against the rent due a debt due to him by the landlord, in which case he shall give notice of the claim or set-off in Form 1 in the Schedule, which may be given before or after the seizure.

Droit de compensation
39(1) Le locataire peut opposer en compensation à un loyer dû une créance qu'il possède sur le locateur, auquel cas il doit donner un avis écrit de la demande en compensation, établi selon la formule 1 de l'annexe. Cet avis peut être donné avant ou après la saisie.

Effect of notice.
39(2) When the notice is given the landlord is entitled to distrain, or to proceed with the distress, only for the balance of the rent after deducting any debt justly due by him to the tenant which is mentioned in the notice.

Effet de l'avis
39(2) Une fois cet avis donné, le locateur a le droit d'effectuer la saisie-gagerie ou de la poursuivre, uniquement pour le solde du loyer, après déduction du montant de la créance légitime mentionnée dans l'avis que le locataire possède sur le locateur.

Service of notice.
39(3) The notice may be served either personally or by leaving it with a grown-up person in, and apparently residing on, the premises occupied by the person to be served; and if the landlord cannot be found and his place of abode is not known, or admission thereto cannot be obtained, the posting up of the notice on some conspicuous part of the premises is good service.

Signification de l'avis
39(3) L'avis peut être signifié à personne ou en le remettant à un adulte se trouvant et résidant apparemment sur les lieux occupés par le destinataire. Si le locateur est introuvable et si son lieu de résidence est inconnu ou si on ne peut y accéder, l'affichage de l'avis en un endroit bien en vue sur les lieux constitue une signification valable.

Defects not to invalidate.
39(4) No proceeding under this section is rendered invalid by any defect in form.

Vices de forme
39(4) Un acte de procédure n'est pas frappé d'invalidité pour vice de forme sous le régime du présent article.

FRAUDULENT REMOVAL

ENLÈVEMENT FRAUDULEUX

Landlords may distrain goods carried off for 30 days.
40(1) Where any tenant, for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is

Saisie-gagerie effectuée dans les 30 jours de l'enlèvement
40(1) Lorsque le locataire de bâtiments et terrains, de biens-fonds, de tènements ou de biens héréditaires aux termes d'une cession à bail ou d'une détention pour la durée de la vie d'une ou de

reserved, due, or made payable, fraudulently or clandestinely conveys away, or carries off or from the premises his goods or chattels to prevent the landlord from distraining the same for arrears of rent so reserved, due or made payable, the landlord or any person by him for that purpose lawfully empowered, may, within 30 days next ensuing the conveying away or carrying off, take and seize such goods and chattels wherever the same are found, as a distress for the arrears of rent, and the same sell or otherwise dispose of in such manner as if the goods and chattels had actually been distrained by the landlord upon the premises for the arrears of rent.

plusieurs personnes, pour une durée déterminée, à titre congéable, par occupation tolérée ou autrement aux termes de laquelle le loyer est réservé, dû ou exigible, transporte frauduleusement ou clandestinement ses biens personnels ou les enlève des lieux loués afin d'empêcher le locateur d'effectuer la saisie-gagerie des biens personnels pour les arriérés d'un loyer ainsi réservé, dû ou exigible, le locateur ou toute personne qu'il autorise légalement à cette fin peut, dans les 30 jours de ce transport ou de cet enlèvement, prendre et saisir ces biens personnels où qu'ils soient pour ces arriérés de loyer, et les vendre ou les aliéner de toute autre façon, de la même manière que si ces derniers avaient été effectivement saisis par le locateur pour des arriérés de loyer sur les lieux d'où ils avaient été ainsi enlevés.

Exemptions.

40(2) No landlord or other person entitled to the arrears of rent shall take or seize, as a distress for the same, any such goods or chattels which have been sold in good faith and for a valuable consideration, before the seizure made, to any person not privy to such fraud.

Interdiction

40(2) Il est interdit au locateur ou à une autre personne ayant droit aux arriérés de loyer de prendre ou de saisir ces biens personnels pour les arriérés de loyer, si ces biens personnels ont été vendus de bonne foi moyennant une contrepartie valable, avant que la saisie n'ait été effectuée, à une personne qui n'a pas connaissance de la fraude.

Right of landlord to break open buildings, etc.

41 Where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant, his servant, or agent, or other person aiding or assisting therein are or are believed to be in any house, barn, stable, outhouse, yard, close or place, locked up, fastened or otherwise secured so as to prevent them from being taken and seized as a distress for arrears of rent, the landlord or his agent may take and seize, as a distress for rent, the goods and chattels, first calling to his assistance a constable or peace officer who is hereby required to aid and assist therein, and, in case of a dwelling house, oath being also first made of a reasonable ground to believe that the goods or chattels are therein, and in the day time, break open and enter into the house, barn, stable, outhouse, yard, close or place and take and

Locateur pouvant pénétrer de force dans les bâtiments

41 Lorsque les objets ou les biens personnels qui sont transportés ou emportés frauduleusement ou clandestinement par le locataire, son préposé, son mandataire ou une autre personne qui y prête son aide ou son concours sont ou sont présumés être mis sous clef, attachés ou mis en sûreté d'une autre façon dans une maison, une grange, une écurie, une dépendance, une cour, un clos ou un endroit afin d'empêcher leur prise et leur saisie par voie de saisie-gagerie pour arriérés de loyer, le locateur ou son mandataire peut prendre et saisir les biens personnels, par voie de saisie-gagerie pour arriérés de loyer. Il le fait en demandant d'abord l'aide d'un agent de police ou d'un agent de la paix, qui est tenu de prêter son aide ou son concours à cette fin. Dans le cas d'une

seize such goods and chattels for the arrears of rent as he might have done if they were in an open field or place upon the premises from which they were so conveyed or carried away.

Penalty for fraudulent removal.
42 If a tenant so fraudulently removes, conveys away or carries off his goods or chattels, or if any person wilfully and knowingly aids or assists him in so doing, or in concealing the same, every person so offending shall forfeit and pay to the landlord double the value of the goods, to be recovered by action in any court of competent jurisdiction.

IMPOUNDING DISTRESS

Beasts distrained.
43(1) Beasts or cattle distrained shall not be removed or driven out of the municipality in which they are distrained.

Separate impoundment.
43(2) No cattle, or other goods or chattels, distrained or taken by way of distress for any cause at one time shall be impounded in several places.

Penalty.
43(3) Every person offending against this section shall forfeit to the person aggrieved $20. in addition to the damages sustained by him.

Where goods to be impounded.
43(4) Any person lawfully taking any distress for any kind of rent may impound, or otherwise secure the distress so made, in such place or on such part of the premises chargeable with the rent as is most fit and convenient for that purpose, and may appraise, sell and dispose of the same upon the premises; and it shall be lawful for

maison d'habitation, il doit d'abord prêter serment qu'il a des motifs raisonnables de croire que les objets ou biens personnels s'y trouvent. Il ne peut pénétrer de force et entrer dans la maison, la grange, l'écurie, la dépendance, la cour, le clos ou l'endroit que de jour et prendre et saisir ces biens personnels pour les arriérés de loyer comme il aurait pu le faire s'ils étaient dans un champ ou autre endroit ouvert et faisant partie des lieux d'où ils ont été transportés ou enlevés.

Sanction pour l'enlèvement frauduleux
42 Si le locataire enlève, transporte ou emporte ainsi frauduleusement ses objets ou biens personnels ou si une personne lui prête délibérément et sciemment son aide ou son concours pour enlever ou dissimuler ces objets, tous les contrevenants sont tenus et doivent payer au locateur le double de la valeur des objets et ce montant est recouvrable par voie d'action devant le tribunal compétent.

GARDE DES OBJETS SAISIS

Animaux saisis
43(1) Les animaux ou le bétail saisis ne doivent pas être déplacés ou emmenés hors de la municipalité d'où la saisie-gagerie a été effectuée.

Garde en plusieurs endroits
43(2) Il est interdit de garder en plusieurs endroits du bétail ou d'autres objets ou biens personnels, saisis ou pris pour une raison quelconque en même temps, par voie de saisie-gagerie.

Sanction
43(3) Quiconque contrevient au présent article doit payer 20 $ à la personne lésée en plus des dommages-intérêts subis par cette personne.

Cas où les objets doivent être gardés
43(4) La personne qui effectue légalement une saisie-gagerie pour tout genre de loyer peut garder ou mettre en lieu sûr de toute autre manière les objets ou biens personnels ainsi saisis dans un endroit ou sur une partie des lieux à raison desquels le loyer est dû et qui est convenable et approprié à cette fin et elle peut évaluer, vendre

any person to come and go to and from such place or part of the premises where any distress for rent is so impounded and secured, to view, appraise and buy, and to carry off or remove the same on account of the purchaser thereof.

ou aliéner les objets ou biens personnels sur les lieux. Lorsque les objets ou biens personnels sont ainsi gardés ou mis en lieu sûr, à la suite d'une saisie-gagerie pour loyer impayé, il est permis à toute personne de se rendre à cet endroit ou sur une partie des lieux et d'en revenir afin d'examiner, d'évaluer, d'acheter, d'emporter ou d'enlever les objets ou biens personnels pour le compte de leur acheteur.

POUND BREACH, OR RESCUE

Damages for pound breach.

44 Upon any pound breach or rescue of goods or chattels distrained for rent the person offending, or the owner of the goods distrained, in case the same are afterwards found to have come to his use or possession, shall forfeit to the person aggrieved $20. in addition to the damages sustained by him.

VIOLATION DE LA GARDE ET REPRISE

Dommages-intérêts en cas de violation de la garde

44 S'il y a violation de la garde ou reprise des objets ou des biens personnels saisis pour loyer impayé, le contrevenant ou le locateur des objets saisis, lorsqu'il apparaît par la suite qu'il en a eu l'usage ou la possession, doit payer 20 $ à la personne lésée en plus des dommages-intérêts subis par cette personne.

SALE OF GOODS DISTRAINED

Sale of distress when made.

45 Where any goods or chattels are distrained for any rent reserved and due upon any demise, lease or contract, and the tenant or owner of them does not, within five days next after the distress taken and notice thereof with the cause of the taking, left at the dwelling house or other most conspicuous place on the premises charged with the rent distrained for, replevy the same, then, after the distress and notice and the expiration of the five days, the person distraining shall cause the goods and chattels so distrained to be appraised by two appraisers, who shall first be sworn to appraise the same truly, according to the best of their understandings, a memorandum of which oath is to be endorsed on the inventory, and after the appraisement the person so distraining may lawfully sell the goods and chattels so distrained for the best price which can be got for the same towards satisfaction of the rent for which the same were distrained and of the charges of the distress, appraisement and sale, and shall hold the overplus, if any, for the owner's use and pay the same over to him on demand.

VENTE DES OBJETS SAISIS

Vente en cas de saisie-gagerie

45 Lorsque des objets ou des biens personnels sont saisis par voie de saisie-gagerie pour non-paiement de loyer réservé et dû aux termes d'une cession à bail, d'un bail ou d'un contrat et que le locataire ou le locateur des objets ou des biens personnels n'oppose pas saisie-revendication dans les cinq jours de la saisie-gagerie et de l'avis qui en indique la cause et qui est laissé dans la maison d'habitation ou dans un autre endroit bien en vue sur les lieux pour le loyer desquels la saisie-gagerie est effectuée, le saisissant doit alors, à l'expiration des cinq jours, faire évaluer les biens personnels saisis par deux évaluateurs. Ceux-ci doivent d'abord prêter serment d'évaluer justement les biens personnels saisis, au mieux de leur jugement, et il doit être fait mention du serment sur l'inventaire. Une fois l'évaluation effectuée, le saisissant peut légalement vendre les objets et les biens personnels ainsi saisis au meilleur prix qui peut en être obtenu en vue de régler le loyer à raison duquel ils ont été saisis ainsi que les frais de saisie-gagerie, d'évaluation et de vente, et détenir l'excédent éventuel à l'usage du locateur et le lui verser sur demande.

RIGHT OF LANDLORD ON TENANT'S BANKRUPTCY

Lien of landlord in bankruptcy.

46(1) In case of an assignment for the general benefit of creditors, or an order being made for the winding-up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the preferential lien of the landlord for rent is restricted to the arrears of rent due during the period of three months next preceding, and for three months following the execution of the assignment, and from thence so long as the assignee retains possession of the premises; but any payment to be made to the landlord in respect of accelerated rent shall be credited against the amount payable by the assignee, liquidator or trustee for the period of his occupation.

Rights of assignee.

46(2) Notwithstanding any provision, stipulation, or agreement, in any lease or agreement or the legal effect thereof, in case of an assignment for the general benefit of creditors, or an order being made for the winding-up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the assignee, liquidator or trustee may, at any time within three months thereafter, for the purposes of the trust estate and before he has given notice of intention to surrender possession or disclaim, by notice in writing, elect to retain the leased premises for the whole or any portion of the unexpired term and any renewal thereof, upon the terms of the lease and subject to the payment of the rent as provided by the lease or agreement; and he may upon payment to the landlord of all arrears of rent, assign the lease with rights of renewal, if any, to any person,

(a) who covenants to observe and perform its terms and agrees to conduct upon the demised premises a trade or business that is not reasonably of a more objectionable or hazardous nature than that which was thereon conducted by the debtor; and

DROIT DU PROPRIÉTAIRE EN CAS DE FAILLITE DU LOCATAIRE

Droit de rétention du locateur en cas de faillite

46(1) Lorsqu'une cession est faite dans l'intérêt général des créanciers, ou qu'une ordonnance de mise en liquidation d'une compagnie constituée en corporation est rendue, ou qu'une ordonnance de séquestre dans une faillite est rendue à l'encontre d'un locataire ou qu'une cession autorisée est faite par ce dernier, le droit de rétention privilégié que possède le locateur pour le loyer est limité aux arriérés de loyer des trois mois immédiatement antérieurs et aux trois mois qui suivent l'exécution de la cession, et ensuite aussi longtemps que le cessionnaire reste en possession des lieux. Cependant, les paiements qui doivent être faits au locateur relativement à un loyer exigible par anticipation doivent être crédités sur le montant payable par le cessionnaire, le liquidateur ou le syndic pour la période de son occupation.

Droits du cessionnaire

46(2) Malgré toute disposition, stipulation ou convention contenue dans un bail ou dans une convention ou leur effet légal, dans le cas d'une cession faite dans l'intérêt général des créanciers, ou lorsqu'une ordonnance de mise en liquidation d'une compagnie constituée en corporation est rendue, ou lorsqu'une ordonnance de séquestre dans une faillite a été rendue à l'encontre d'un locataire, ou lorsqu'un locataire a effectué une cession autorisée, le cessionnaire, le liquidateur ou le syndic peut, à tout moment dans les trois mois qui suivent pour les besoins du patrimoine de la fiducie et avant d'avoir donné un avis d'intention de rétrocéder la possession du bail ou d'y renoncer, choisir, au moyen d'un avis par écrit, de conserver les lieux loués pendant la totalité ou une partie du terme non expiré et de tout renouvellement de ce terme, selon les modalités du bail et sous réserve du paiement du loyer prévu par le bail ou la convention. En outre, il peut, sur paiement au locateur de tous les arriérés de loyer, céder le bail et les droits de renouvellement, s'il en est, à quiconque :

a) s'engage à observer et exécuter ces modalités et consent à exploiter sur les lieux loués un commerce ou une entreprise qui, raisonnablement, n'est pas d'une nature plus inacceptable ou dangereuse que celui que le débiteur y exploitait;

(b) who on application of the assignee, liquidator or trustees, is approved by a judge of the Court of Queen's Bench as a person fit and proper to be put in possession of the leased premises.

Election of assignee to surrender.

47(1) The assignee, liquidator or trustee has the further right, at any time before so electing, by notice in writing to the landlord, to surrender possession or disclaim any such lease; and his entry into possession of the leased premises and the occupation thereof by him, while required for the purposes of the trust estate, shall not be deemed to be evidence of an intention on his part to elect to retain possession under section 46.

Right of sub-tenants.

47(2) Where the assignor, or the person or firm or corporation against whom a receiving order has been made in bankruptcy, or a winding-up order has been made, being a lessee, has, before the making of the assignment or order, demised by way of under-lease, approved or consented to in writing by the landlord, any premises and the assignee, liquidator or trustee surrenders, disclaims or elects to assign the lease, the under-lessee shall, if he so elects in writing within three months of the assignment or order, stand in the same position with the landlord as though he were a direct lessee from the landlord, but subject, except as to rental payable, to the same liabilities and obligations as the assignor, bankrupt or insolvent company was subject to under the lease at the date of the assignment or order.

Rental from under-lessee.

47(3) The under-lessee shall, in that event, be required to covenant to pay to the landlord a rental not less than that payable by the under-lessee to the debtor, and if the last mentioned rental was greater than that payable by the debtor to the landlord the under-lessee shall be required to covenant to pay to the landlord the like greater rental.

b) est agréé par un juge de la Cour du Banc de la Reine, à la demande du cessionnaire, du liquidateur ou des syndics, comme étant une personne capable et appropriée pouvant être mise en possession des lieux loués.

Cas où le cessionnaire choisit de rétrocéder

47(1) Le cessionnaire, le liquidateur ou le syndic a en outre le droit, à tout moment avant d'exercer ce choix et au moyen d'un avis par écrit au locateur, de rétrocéder la possession du bail ou d'y renoncer: sa prise de possession des lieux loués et leur occupation par lui alors que les fins du patrimoine de la fiducie le requièrent ne sont pas réputées constituer la preuve de son intention de choisir d'en conserver la possession en conformité avec l'article 46.

Droit des sous-locataires

47(2) Lorsque le cédant ou la personne, l'entreprise ou la corporation contre laquelle a été rendue une ordonnance de séquestre dans une faillite ou une ordonnance de liquidation sont des preneurs à bail et avaient, avant que cette cession soit faite ou cette ordonnance rendue, transféré des lieux en sous-location à laquelle le locateur avait donné son approbation ou son consentement par écrit, et que le cessionnaire, le liquidateur ou le syndic rétrocède le bail, y renonce ou choisit de le céder, le sous-locataire se trouve, s'il en exerce l'option par écrit dans les trois mois de la cession ou de l'ordonnance, dans la même position par rapport au locateur que s'il était son preneur à bail direct, tout en restant assujetti, sauf en ce qui concerne le loyer exigible, aux mêmes responsabilités et obligations que celles auxquelles étaient soumis le cédant, le failli ou la compagnie insolvable aux termes du bail à la date de la cession ou de l'ordonnance.

Loyer du sous-locataire

47(3) Le sous-locataire doit, dans ce cas, être tenu de s'engager à payer au locateur un loyer non inférieur à celui que le sous-locataire devait payer au débiteur et si ce dernier loyer est supérieur à celui que le débiteur payait au locateur, le sous-locataire est tenu de s'engager à payer au locateur ce loyer d'un montant supérieur.

Settlement of dispute.
47(4) Where a dispute arises under this section, it shall be disposed of, upon a summary application, by a judge of the Court of Queen's Bench.

DISTRAINABLE GOODS
TAKEN IN EXECUTION

Goods taken in execution subject to rent.
48(1) Goods or chattels lying or being in or upon any land leased for life or lives, or term of years, at will or otherwise shall not be liable to be taken by virtue of any execution on any pretence whatsoever unless the party at whose suit the execution is sued out before the removal of the goods or chattels from the premises by virtue of the execution, pays to the landlord or his bailiff all money due for rent of the premises at the time of the taking of the goods or chattels by virtue of the execution if the arrears of rent do not amount to more than three months' arrears of rent when the rent is payable quarterly or more frequently, or to more than one year's arrears when the rent is payable less frequently than quarterly.

When execution can proceed.
48(2) If the arrears exceed three months' rent, when the rent is payable quarterly or more frequently or one year's rent when the rent is payable less frequently than quarterly the party at whose suit the execution is sued out, on paying the landlord or his bailiff the three months' arrears in cases when the rent is payable quarterly or more frequently or the one year's rent in other cases, may proceed to execute his judgment.

Payment to execution creditor.
48(3) The sheriff or other officer shall levy and pay to the execution creditor the money so paid for rent in addition to the execution money.

Règlement du litige
47(4) Tout litige qui porte sur une question relevant du présent article doit être réglé par un juge de la Cour du Banc de la Reine sur demande sommaire.

OBJETS SAISISSABLES PRIS
EN VERTU D'UN BREF D'EXÉCUTION

Objets pris en vertu d'un bref d'exécution sous réserve du loyer
48(1) Les objets ou biens personnels se trouvant dans ou sur un bien-fonds donné à bail pour la durée de la vie d'une ou plusieurs personnes, pour une durée déterminée, à titre congéable ou autrement ne peuvent sous aucun prétexte être saisis en vertu d'un bref d'exécution, à moins que la partie à l'instance de laquelle le bref d'exécution est décerné ne paie au locateur ou à son huissier, avant d'enlever ces objets ou biens personnels des lieux en vertu du bref d'exécution, toutes les sommes d'argent dues pour la location des lieux à la date de la saisie de ces objets ou biens personnels en vertu du bref d'exécution, si les arriérés de loyer ne dépassent pas trois mois d'arriérés de loyer lorsque le loyer est payable par trimestre ou plus fréquemment ou, s'ils ne dépassent pas une année d'arriérés de loyer lorsque le loyer est payable moins fréquemment que par trimestre.

Cas où le bref d'exécution peut être exécuté
48(2) Si les arriérés dépassent trois mois de loyer lorsque le loyer est payable par trimestre ou plus fréquemment ou s'ils dépassent une année de loyer lorsque le loyer est payable moins fréquemment que par trimestre, la partie à l'instance de laquelle le bref d'exécution est décerné peut exécuter son jugement après paiement au locateur ou à son huissier des trois mois d'arriérés de loyer dans les cas où le loyer est payable par trimestre ou plus fréquemment ou d'une année de loyer dans les autres cas.

Paiement au créancier saisissant
48(3) Le shérif ou autre auxiliaire de la justice doit prélever et verser au créancier saisissant les sommes d'argent payées au titre du loyer en plus de celles pour lesquelles le bref d'exécution a été décerné.

Crops seized while on land liable for rent.

49 Where all or any part of the standing crops of the tenant of any land is seized and sold by any sheriff or other officer by virtue of any writ of execution the crops, so long as the same remain on the land in default of sufficient distress of the goods and chattels of the tenant, shall be liable for the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of the rent, and that notwithstanding any bargain and sale or assignment which may have been made or executed of the crop by any such sheriff or other officer.

Récoltes saisies garantissant le paiement du loyer

49 Lorsque tout ou partie des récoltes sur pied du locataire d'un bien-fonds est saisi et vendu par un shérif ou autre auxiliaire de la justice en vertu d'un bref d'exécution, ces récoltes, aussi longtemps qu'elles restent sur le bien-fonds, doivent, à défaut de saisie-gagerie suffisante des objets et des biens personnels du locataire, répondre du paiement du loyer qui arrive à échéance et est dû au locateur postérieurement à la saisie et à la vente et être assujetties aux recours par voie de saisie-gagerie pour recouvrer ce loyer, et ce, malgré la vente parfaite ou la cession portant sur ces récoltes que le shérif ou l'autre auxiliaire peut avoir faites ou passées.

WRONGFUL OR IRREGULAR DISTRESS

SAISIES-GAGERIES ILLÉGALES OU IRRÉGULIÈRES

Irregularities not to void distress.

50 Where any distress is made for any kind of rent justly due, and any irregularity is afterwards done by the person distraining, or by his agent, or if there has been an omission to make the appraisement under oath, the distress itself shall not be therefor deemed to be unlawful, nor the person making it deemed a trespasser ab initio, but the person aggrieved by the irregularity may recover by action full satisfaction for the special damage sustained thereby.

Irrégularités n'entrainant pas l'annulation de la saisie

50 Lorsque la saisie-gagerie est effectuée pour toute sorte de loyer légitimement dû et que le saisissant ou son mandataire commet par la suite une irrégularité ou que l'évaluation n'a pas été effectuée sous serment, la saisie-gagerie elle-même ne doit pas être réputée illégale et le saisissant ne doit pas être réputé un intrus ab initio, mais la personne lésée par l'irrégularité peut, par voie d'action, obtenir réparation intégrale des dommages-intérêts spéciaux subis de ce fait.

Damages for wrongful distress.

51(1) A distrainor who takes an excessive distress, or takes a distress wrongfully, shall be liable in damages to the owner of the goods or chattels distrained.

Dommages-intérêts en cas de saisie-gagerie illégale

51(1) Le saisissant qui effectue une saisie-gagerie excessive ou qui effectue illégalement une saisie-gagerie s'expose à payer des dommages-intérêts au locateur des objets ou biens personnels saisis.

Where no rent due.

51(2) Where a distress and sale are made for rent pretended to be in arrear and due when, in truth, no rent is in arrear or due to the person distraining, or to the person in whose name or right the distress is taken, the owner of the goods or chattels distrained and sold, his executors or administrators shall be entitled, by action to be brought against the person so distraining, to recover full satisfaction for the damage sustained by the distress and sale.

Cas où nul loyer n'est dû

51(2) Lorsque la saisie-gagerie et la vente sont effectuées pour un loyer allégué en retard et dû alors qu'en vérité, aucun loyer n'est en retard ni dû au saisissant ou à la personne au nom ou au titre de laquelle cette saisie-gagerie est effectuée, le locateur des objets ou biens personnels saisis et vendus, ses exécuteurs testamentaires ou administrateurs ont le droit, par voie d'action intentée contre le saisissant, d'obtenir réparation intégrale des dommages subis du fait de la saisie-gagerie et de la vente.

DISPUTES AS TO RIGHT TO DISTRAIN

Definition of "judge".
59 In this Part "judge" means a judge of the Court of Queen's Bench.

Disputes as to distress.
60(1) Where goods or chattels are distrained by a landlord for arrears of rent, and the tenant disputes the right of the landlord to distrain in respect of the whole or any part of the goods or chattels, or disputes the amount claimed by the landlord, or the tenant claims to set-off against the rent a debt which the landlord disputes, the landlord or the tenant may apply to the judge to determine the matters so in dispute, and the judge may hear and determine the same in a summary way, and may make such order in the premises as he may deem just.

Application to judge.
60(2) Where the tenant disputes the right of the landlord to distrain in respect of the whole or any part of the goods or chattels, or disputes the amount claimed by the landlord, the landlord or the tenant may before any distress has been made apply to the judge to determine the matter so in dispute, and the judge may hear and determine the same in a summary way, and may make such order in the premises as he may deem just.

Order pending determination.
61 Where notice of such an application has been given to the landlord or tenant, as the case may be, the judge, pending the disposition of it by him, may make such order as he may deem just

(a) for the restoration to the tenant of the whole or any part of the goods or chattels distrained, or preventing a distress being made, upon the tenant giving security, by payment into court or otherwise as the judge may direct; or

(b) for the payment of the rent which shall be found due to the landlord and for the costs of the distress and of the proceedings before the judge and of any appeal from his order, or such of them as the tenant may be ordered to pay.

LITIGES RELATIFS AU DROIT D'EFFECTUER UNE SAISIE-GAGERIE

Définition de "juge"
59 Dans la présente partie, "juge" s'entend d'un juge de la Cour du Banc de la Reine.

Litiges relatifs à une saisie-gagerie
60(1) Lorsque le locateur effectue une saisie-gagerie des objets ou biens personnels pour arriérés de loyer et que le locataire conteste le droit du locateur d'effectuer la saisie-gagerie de la totalité ou d'une partie des objets ou biens personnels, ou qu'il conteste le montant revendiqué par le locateur, ou que le locataire oppose en compensation au loyer une créance que conteste le locateur, le locateur ou le locataire peut demander au juge de trancher les questions en litige et le juge peut les entendre, les trancher de façon sommaire et rendre l'ordonnance qu'il estime appropriée en l'espèce.

Demande à un juge
60(2) Lorsque le locataire conteste le droit du locateur d'effectuer la saisie-gagerie de la totalité ou d'une partie des objets ou biens personnels ou conteste le montant revendiqué par le locateur, le locateur ou le locataire peut, avant l'exécution d'une saisie-gagerie, demander au juge de trancher la question en litige, et le juge peut l'entendre et la trancher d'une façon sommaire et rendre toute ordonnance qu'il estime appropriée en l'espèce.

Ordonnance
61 Lorsque l'avis d'une telle demande a été donné au locateur ou au locataire, selon le cas, le juge peut, en attendant de trancher le litige, rendre une ordonnance qu'il estime appropriée :

a) visant soit à restituer au locataire la totalité ou une partie des objets ou des biens personnels saisis ou à empêcher que soit effectuée une saisie-gagerie, si le locataire fournit une sûreté soit en consignant le paiement au tribunal, soit de toute autre façon que le juge peut ordonner;

b) visant soit le paiement du loyer jugé dû au locateur, des frais de la saisie-gagerie et des procédures intentées devant le juge, ainsi que d'un appel de son ordonnance ou ceux de ces frais qu'il peut être ordonné au locataire de payer.

Jurisdiction of judge.
62 The judge has jurisdiction and authority to determine any question arising upon the application that the court of which he is judge has jurisdiction to determine in an action brought in that court.

Judgment final.
63 Where the amount claimed by the landlord does not exceed $100. the decision of the judge is final.

Appeal from summary trial.
64 Where the amount claimed by the landlord exceeds $100., an appeal lies from any order of the judge, made on an application to him under section 60, by which the matters in dispute are determined, in like manner as if they were a judgment of the court of which he is judge pronounced in an action.

Appeal from trial.
65 Where an issue is tried there is the same right of appeal from the judgment as if the judgment had been pronounced in an action.

Other remedies preserved.
66 Nothing in this Part takes away or affects any remedy that a tenant may have against his landlord or requires a tenant to proceed under this Part instead of by bringing an action; but where, instead of proceeding under this Part, he proceeds by action, the court in which the action is brought, if of opinion that it was unnecessarily brought and that a complete remedy might have been had by a proceeding under this Part, may direct the tenant, although he succeeds, to pay any additional costs occasioned by his having brought the action.

Compétence du juge
62 Le juge a la compétence et le pouvoir de trancher les questions en litige résultant de la demande que le tribunal dont il est juge a la compétence de trancher dans une action intentée devant ce tribunal.

Jugement final
63 Lorsque le montant revendiqué par le locateur ne dépasse pas 100 $, la décision du juge est finale.

Appel suite à une procédure sommaire
64 Lorsque le montant revendiqué dépasse 100 $, l'appel d'une ordonnance rendue par le juge à la suite d'une demande qui lui est présentée en conformité avec l'article 60, par laquelle le litige est décidé, est interjeté de la même manière qu'est interjeté l'appel d'un jugement prononcé dans une action par le tribunal dont il est juge.

Appel suite à un procès
65 Lorsque la question en litige est instruite par procès, les parties peuvent se prévaloir du même droit d'appel du jugement tout comme si le jugement avait été prononcé à la suite d'une action.

Protection des autres recours
66 La présente partie ne porte atteinte à un recours que le locataire peut posséder contre son locateur, ni ne lui enlève aucun recours, ni n'oblige le locataire à procéder en conformité avec la présente partie au lieu d'intenter une action. Cependant, lorsque le locataire intente une action au lieu de procéder en conformité avec la présente partie, le tribunal devant lequel l'action est intentée peut, s'il est d'avis qu'elle a été intentée inutilement et qu'un recours complet aurait pu être obtenu en utilisant la procédure prévue à la présente partie, ordonner que le locataire verse les frais additionnels entraînés du fait qu'il a choisi d'intenter une action, même s'il obtient gain de cause.

APPENDIX C

DRAFT *RENT DISTRESS ACT, 1981* PROPOSED BY THE LAW REFORM COMMISSION OF BRITISH COLUMBIA

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Interpretation

1. In this Act,

"court" means the Supreme Court of British Columbia or a County Court;
"goods" means all chattels personal other than things in action and money, and includes growing crops and other things attached to or forming part of the land that may be severed and sold;
"landlord" means a person to whom a rent obligation is owed;
"rent obligation" means a monetary obligation in consideration for the use or occupation of rented premises, that is due and in arrear of payment;
"rented premises" means immovable property occupied or used by a tenant out of which a rent obligation arises;
"right of distress" means a right granted under this Act to seize and dispose of goods to enforce the payment of a rent obligation;
"security interest" means an interest in goods that secures payment or performance of an obligation;
"tenant" means the person who owes a rent obligation;
"wrongful seizure" includes

(a) a seizure of goods in which the tenant has no right or interest, or in which the tenant's right or interest is limited to
  (i) a temporary right to possession, or
  (ii) a lien on the goods for their storage or for improvements or repairs made to them,
(b) a seizure of goods having a value unreasonably in excess of the amount necessary to satisfy the tenant's rent obligation,
(c) a seizure of goods
  (i) when there is no rent obligation, or
  (ii) after the tenant has tendered the amount of the rent obligation to the landlord,
(d) the failure to
  (i) deliver up possession of goods seized to any person entitled to possession,
  (ii) comply with section 7,
  (iii) comply with a demand under section 6(4), or
  (iv) give effect to the rights of persons other than the tenant arising under this Act or any other law.

Right of distress

2. (1) A landlord has a right of distress exercisable in accordance with this Act.

(2) No landlord has a right of distress except in accordance with this Act.

(3) No person may waive the provisions of this Act and any agreement to the contrary is not enforceable.

(4) A landlord may employ or engage an agent or bailiff for the purpose of enforcing his right of distress.

(5) This Act does not apply to a rent obligation arising under a tenancy agreement under the *Residential Tenancy Act*.

(6) Section 65 of the *Court Order Enforcement Act* does not apply to a seizure or disposition made under a right of distress.

(7) The *Creditor Assistance Act* does not apply to a disposition made under a right of distress.

(8) The rights of a landlord as against a trustee in bankruptcy of the tenant shall be determined without regard to this Act.

Seizure of goods

3 (1) A landlord acting under a right of distress may seize any goods which he finds on the rented premises that may lawfully be seized by a sheriff acting under the authority of a writ of seizure and sale directed to the goods of the tenant.

(2) Subject to section 6(3) and 7 the rights of a landlord with respect to
(a) the goods he has seized, and
(b) the proceeds of the disposition of the goods,
shall be determined, as against any person other than the tenant who had rights in or to the goods before the seizure, as if the landlord were an execution creditor who has caused the goods to be seized under the authority of a writ of seizure and sale.

Right of entry

4. A landlord acting under a right of distress may enter the rented premises and seize goods by any means that may lawfully be used by a sheriff acting under the authority of a writ of seizure and sale.

When seizure is effective

5. Where goods, that have been seized by a landlord under a right of distress, are not taken into the landlord's exclusive physical custody and control, the seizure is not effective against third persons unless the landlord has
(a) registered a notice of the seizure in accordance with section 6(1)(c), or
(b) physically secured or impounded the goods on the rented premises in a way that
(i) deprives the tenant of all control over and use of the goods, and
(ii) gives the landlord unrestricted access to the goods.

Registration of notice of seizure

6. (1) Where goods have been seized by a landlord under a right of distress, the landlord may
(a) prepare a notice of seizure setting out
(i) a description of the goods as prescribed,
(ii) his identity and the identity of the tenant and any other person who has physical custody and control of the goods,
(iii) the location of the rented premises, and
(iv) the date of the seizure,
(v) the tenant's right of redemption under section 8 and the amount of the rent obligation.
(b) give a copy of the notice of seizure to the tenant no later than 5 days after the seizure, and
(c) register in the prescribed office a prescribed notice.

(2) A registration of the notice under subsection (1)(c) is effective against third persons from the date of registration.

(3) Subject to section 7 the rights of a landlord, after a notice of seizure has been registered under subsection (1)(c) in respect of the goods he has seized, shall be determined, as against a person other than the tenant who acquires or purports to acquire rights in or to the goods seized after the registration, as if the landlord had acquired his rights to the goods under a chattel mortgage that was properly executed and registered on the date the notice was registered under subsection (1)(c).

(4) Where a notice has been registered under subsection (1)(c) and the rent obligation has subsequently been satisfied the landlord shall, on demand of the tenant, prepare and deliver to the tenant a notice in prescribed form confirming that the seizure is released.

(5) A notice delivered pursuant to a demand under subsection (4) may be registered in the prescribed office, and on its registration the notice registered under subsection 1(c) is cancelled.

Disposal of seized goods

7. (1) The landlord may dispose of any of the seized goods before or after the goods have been repaired, processed or prepared for disposition.

(2) Proceeds of the disposition of seized goods shall be applied and distributed in the following order to satisfy
(a) the reasonable expenses of seizing, holding, repairing, processing or preparing the goods for disposition, disposing of the goods and any other reasonable expenses incidental to the seizure or distribution incurred by the landlord,

(b) the rent obligation, and
(c) an obligation secured by a security interest in the goods that is subordinate to the interest of the landlord,
and any balance shall be paid to the tenant or any other person legally entitled to it.

(3) Before a person is entitled to receive proceeds of the disposition under subsection (1)(c), he shall
(a) send a written demand to the landlord before the distribution of the proceeds is completed, and
(b) on request, deliver within a reasonable time to the landlord reasonable proof of his security interest.

(4) The landlord may dispose of the goods seized in whole or in part
(a) by public sale, private sale, lease or otherwise,
(b) subject to subsection (6), at any time and place, and
(c) on any terms,
so long as every aspect of the disposition is commercially reasonable.

(5) The landlord may retain the goods seized in whole or in part for a period of time that is commercially reasonable.

(6) Unless
(a) the goods are perishable, or
(b) the landlord believes on reasonable grounds, that the goods will quickly depreciate in value,
the landlord shall give not less than 15 days' notice in the prescribed form of his intention to dispose of the goods to the tenant and to any other person who
(c) has a security interest in the goods, and
(d) has registered his interest or notice of his interest under an applicable enactment.

(7) The landlord who seized the goods shall not purchase all or any part of the goods seized unless
(a) the goods are sold at a public sale, or
(b) a court on application otherwise orders.

(8) Where a landlord disposes or purports to dispose of goods seized in accordance with this section, whether or not the goods were wrongfully seized, the disposition
(a) terminates any interest of the landlord in the goods, and
(b) if made to a *bona fide* purchaser for value acting in good faith, terminates
(i) the tenant's interest in the goods,
(ii) any security interest in the goods subordinate to the landlord's interest, and
(iii) the interest of any other person in the goods, other than a person who has a security interest having priority over the landlord's interest under section 3(2)or 6(3).

(9) If requested in writing by the tenant or any other person with an interest in the goods seized, the landlord shall provide a statement of the disposition of the goods, and the distribution of the proceeds of the disposition.

Redemption of seized goods

8. At any time before the landlord has disposed of or contracted to dispose of the goods seized, the tenant, owner of the goods or any person with a security interest in the goods may redeem the goods by tendering to the landlord a sum sufficient to satisfy
(a) the rent obligation,
(b) the reasonable expenses incurred by the landlord of seizing, holding, repairing, processing or preparing the goods for disposition, and arranging for the disposition, and
(c) any other reasonable expenses incurred by the landlord.

Unlawful removal of goods

9. (1) Where a tenant has
(a) with the intent to defeat his landlord's right of distress, removed from the rented premises goods that would otherwise be subject to seizure, or
(b) retaken possession of, and removed from the rented premises, goods that have been seized or impounded in accordance with section 5(b),
a court may, on application by the landlord, order the tenant to deliver possession of any goods remaining in his custody and control to the landlord.

(2) In an application under subsection (1), the court may award the landlord costs on a solicitor and client basis and, in a serious case of misconduct by the tenant, may award exemplary damages.

Damages for wrongful seizure

10. (1) A person who has sustained loss, damage or convenience [sic] arising out of a wrongful seizure may recover damages from the landlord or the landlord's agent or bailiff employed or engaged by him to enforce his right of distress.

(2) Where a landlord has employed or engaged a bailiff or agent to enforce a right of distress, the landlord and the agent or bailiff are jointly and severally liable for the payment of any damages under subsection (1).

(3) In any proceeding under subsection (1), the court may award the plaintiff costs on a solicitor and client basis and may award exemplary damages where the defendant's conduct was reckless or demonstrated a flagrant disregard of the rights of the tenant or any other person having an interest in the goods seized.

Transition

11. (1) Subject to subsections (2) and (3), where goods have been seized before this Act comes into force under a right of distress

(a) as defined in this Act, or

(b) created by an enactment repealed by this Act

any question as to the rights of a person in or to the goods shall be resolved as if this Act had not come into force, whether or not the goods are disposed of or the proceeds of their disposition are distributed after this Act comes into force.

(2) Where

(a) a seizure of goods has occurred as described in subsection (1), and

(b) at the time this Act comes into force, the goods were not

(i) in the exclusive physical custody and control of the person that seized them, or

(ii) secured or impounded in accordance with section 5(b),

the seizure remains effective for 6 months only after the time this Act comes into force unless the person that seized the goods

(c) registers a notice of the seizure under section 6(1) as if he were a landlord,

(d) takes exclusive physical custody and control of the goods, or

(e) secures or impounds the goods in accordance with section 5(b).

(3) Where a person proceeds under subsection 2(c) to (e), the act of registration, taking custody and control or impoundment shall be deemed to have been done on the date this Act comes into force.

(4) Where the effectiveness of a seizure of goods is continued by an act described in subsection (2)(c) to (e), the rights of the person that seized the goods shall be determined under this Act as against any person whose interest in the goods arose after this Act comes into force.

Regulations

12. The Lieutenant Governor in Council may make regulations including

(a) prescribing notices to be prepared under sections 6 and 7,

(b) designating the proper office for registration under section 6, and

(c) prescribing fees for registration under section 6.

Consequential Amendments

. . . .

Commencement

34. This Act comes into force on proclamation.